(7)

No. 83-469-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Billy G. Young

Docketed:
September 19, 1983

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Bailey, Burck

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1983		Application for extension of time to file petition and order granting same until September 18, 1983 (White, August 12, 1983).
2	Sep 19 1983	G	Petition for writ of certiorari filed.
3	Oct 21 1983		Brief of respondent Billy G. Young in opposition filed.
4	Nov 9 1983		DISTRIBUTED. November 23, 1983
6	Feb 1 1984		REDISTRIBUTED. February 17, 1984
8	Feb 21 1984		Petition GRANTED.
			**********
10	Apr 3 1984		Order extending time to file brief of petitioner on the merits until May 7, 1984.
11	May 2 1984		Joint appendix filed.
12	May 7 1984		Order further extending time to file brief of petitioner on the merits until May 21, 1984.
13	May 21 1984		Brief of petitioner United States filed.
15	Jun 19 1984		Order extending time to file brief of respondent on the merits until June 29, 1984.
16	Jun 20 1984		Record filed.
17	Jun 20 1984		Certified copy of C. A. proceedings received.
18	Jun 25 1984		Brief of respondent Billy G. Young filed.
19	Jul 5 1984		Record filed.
20	Jul 5 1984		Certified original record & exhibits received.
21	Aug 8 1984		CIRCULATED.
22	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 2, 1984. (3rd case)
23	Sep 13 1984	G	Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice filed.
24	Sep 18 1984		Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument pro hac vice GRANTED.
25	Sep 17 1984	X	Reply brief of petitioner United States filed.
26	Oct 2 1984		ARGUED.

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No. 83-469

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a prosecutor may rebut closing defense argument impugning the integrity of the prosecution and asserting that the prosecutors themselves do not believe in the defendant's guilt by responsive argument that would be inappropriate in the absence of such provocation.

2. Whether the court of appeals erred in reversing on the basis of the prosecutor's remarks when respondent did not object to the remarks at trial.

3. Whether, assuming the prosecutor's remarks were improper, the court of appeals erred in failing to determine whether they constituted harmless error.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing with suggestion of rehearing en banc was denied on June 20, 1983 (App. B, *infra* 12a). On August 12, 1983, Justice White extended the time to petition for a writ

of certiorari to and including September 18, 1983 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, respondent was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, and three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001.[1] He was sentenced to two years' imprisonment and fines of $39,000. The court of appeals reversed (App. A, *infra*, 1a-11a).

1. The evidence at trial showed that respondent, vice president and general manager of Compton Petroleum Corporation ("Compton") in Abilene, Texas, contracted in 1976 and 1977 to deliver quantities of Oklahoma "sweet" crude oil[2] to the Apco Oil Corporation ("Apco") refinery at Cyril, Oklahoma. Some 205,000 barrels of oil were delivered between January and September, 1977, but approximately 117,250 barrels consisted of fuel oil, an already refined product different from and less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all the oil was crude

[1] Prior to trial, the government dismissed one other mail fraud count, and at the close of the evidence, the district court granted a judgment of acquittal on a second mail fraud count. The jury acquitted respondent on one count of interstate transportation of stolen property (18 U.S.C. 2314). Compton Petroleum Corporation was also indicted with respondent. Prior to trial, the district court accepted the corporation's nolo contendere plea to the indictment and imposed a fine (App. A, *infra*, 3a).

[2] Crude oil is a liquid hydrocarbon in its natural state. "Sweet" crude oil has a low sulfur content.

oil. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, the amount of crude oil it thought it was refining each month. The FEA in turn relied on Apco's reports to determine the national averages of tier categories of refined oil for purposes of equalizing the cost of crude oil under its entitlements program (App. A, *infra*, 2a-3a).

In December 1976, respondent agreed with Hugh Bradley, Apco's vice president of supply and transportation, to increase the amount of crude oil that Compton was delivering to Apco's Cyril refinery. Shortly afterward, respondent and Bradley signed a contract formalizing that agreement; they later amended the agreement to make it automatically renewable each month (Tr. 351-353, 508-511).

Although respondent caused certain amounts of crude oil to be delivered to Apco in compliance with the contract, he used other means of supply for the remainder of the oil deliveries. In the same period that respondent spoke with Bradley, respondent suggested an arrangement with Kenneth Ross, a longtime friend and business associate (Tr. 339-340). Ross owned Prime Resources Corporation, an oil brokerage firm (Tr. 303, 318-320). Under respondent's plan, Ross was to secure fuel oil and falsely certify that it was crude oil; in turn, respondent would have Compton pay Ross a 10¢ per barrel commission as a fee for the recertification (Tr. 323, 339-340). Ross fulfilled his agreement; he began to buy fuel oil from Producer's Crude, Inc., an Abilene, Texas oil reseller. The invoices from Producer's Crude to Prime Resources accurately stated that fuel oil was transferred, but Prime Resources' invoices to

Compton for the same oil certified that crude oil was sold (Tr. 180, 253-254, 272, 306-311, 320-321, 421-423).[3]

The fuel oil was delivered from the refinery to two holding tanks in Compton's yard in Abilene (Tr. 49, 84-90, 97, 125, 137-138, 156). To make it appear that the tanks contained crude oil, Compton's truck dispatcher painted a crude oil lease number on the tanks (Tr. 99-101, 140-141). Several Compton truck drivers then reloaded the fuel oil into Compton trucks and delivered it to the Apco refinery in Cyril (Tr. 96, 107-111, 120-121, 124, 135-137, 153-155, 160, 165-66). Though Compton's drivers normally performed two simple tests on crude oil obtained from a lease site, they were told that it was not necessary to perform any tests on the oil taken from the tanks in Compton's yard (Tr. 52-53, 105-106, 129, 144).[4]

At Apco's Cyril refinery, the Compton drivers emptied their fuel oil into a lease automatic custody

[3] Producer's Crude bought the fuel oil from another Abilene concern, Pride Refinery (Tr. 421-423). Respondent's nephew, Mike Rawlings, who worked for Producer's Crude, transported the fuel oil from the refinery to Compton's yard in Abilene, a little over three miles away. Rawlings made between two and six round trips per day, thereby hauling twenty to twenty-five thousand barrels of fuel oil each month from March through September, 1977 (Tr. 84-90). Before Rawlings' tenure, some loads of fuel oil were moved by Compton drivers directly from the Pride refinery to Apco at Cyril (Tr. 131, 163-164, 166-167).

[4] Those tests are known in the trade as "shakeouts." A small quantity of crude oil is placed in a device which measures its relative weight in degrees. This is referred to as the "gravity" of the oil. In addition, the crude oil's basic sediment and water (BS&W) content is measured (Tr. 47, 52-53, 105).

transfer ("LACT") unit. The LACT unit, which was not manned, automatically measured the number of barrels in each delivery. It also collected a small sample of each barrel for later testing (Tr. 47, 375-377). Such testing would reveal, *inter alia*, the relative weight—known as "gravity"—of the oil. A high gravity crude oil, in the 35° to 40° gravity range, yields greater quantities of gasoline and diesel fuel after refining than does a lower gravity crude oil, which yields more fuel oil and asphalt (Tr. 400-405, 414).[5] Apco wanted a high gravity crude for gasoline production (Tr. 357, 400-403).

Because fuel oil has a low gravity, respondent made arrangements to conceal what he was supplying. He had Compton's crude oil trader purchase from two other companies quantities of condensate, a high gravity liquid taken from the well heads of natural gas wells. The condensate was delivered to a Compton storage station at Chickasha, Oklahoma (Tr. 51, 53-54, 64-66, 80, 179). Compton drivers later moved the condensate to the LACT unit at Apco's Cyril refinery (Tr. 123-125, 130, 155). Since the condensate's gravity was 60° or higher, its blending with the fuel oil in the LACT unit resulted in an increase in the gravity measurement of the oil stream (Tr. 52, 56, 76).

Respondent's scheme was common knowledge among the Compton truck drivers who delivered fuel oil to Apco (Tr. 121, 157-158). Other Compton employees were not as knowledgeable. When Kenneth Fuller, Compton's operations manager and respondent's second in command, discovered that fuel oil was being delivered to Apco, he confronted respondent, who

[5] Fuel oil comes from the "bottom of the barrel" and is not a profitable product for a refinery (Tr. 422, 424).

replied that there was "no problem" with such deliveries (Tr. 72-73, 76-77). And in April 1977, Homer Reves, Compton's chief accountant, told another employee that something was not right about the Apco transaction, because Compton was buying oil from Prime Resources yet was paying a second company for most of the oil (Tr. 201-202). On one occasion, L. K. Bird, another Compton accountant, received an invoice from Prime Resources for "burned fuel" rather than crude oil. Bird showed the invoice to Reves, who said that fuel oil was being delivered to Apco contrary to the terms of Compton's contract with Apco. Reves also said that he believed that Prime Resources was being paid a fee for changing the certification concerning the oil (Tr. 251, 261-262). Reves returned the fuel oil invoice to Prime, and he later received in its place an invoice for crude oil (Tr. 268-269).[6] In addition, Judy Boeshart, a Compton production supervisor, heard respondent tell another Compton employee that fuel oil would be invoiced through Ken Ross, who would change the certifications to reflect crude oil instead. Ross's fee for this service was to be 10¢ per barrel (Tr. 273-274).

Despite the growing numbers of persons at Compton who were aware of respondent's scheme, Apco was slow to discover it. Not until September 1977, as the result of an investigation prompted by another company's delivery of fuel oil, did Apco determine that

[6] After the instant investigation began, Kenneth Ross and his wife Jerit, who had prepared the invoices containing false certifications that crude oil was sold, substituted in Prime Resources' files new invoices that correctly stated that fuel oil had been sold (Tr. 306-307, 320-322).

respondent also was furnishing fuel oil. Later in September, a sample was taken from the LACT unit used by Compton, and an Apco laboratory technician performed a distillation test on that sample.[7] The technician's conclusion was that the oil provided by respondent was not crude oil (Tr. 354-355, 368, 378-379, 403-405). On learning of the test results, Don Heavin, Apco's pipeline superintendent and a friend of respondent, called respondent and asked if he was delivering virgin crude oil. Respondent said that he was (Tr. 379).[8] Heavin reported the test results to Hugh Bradley, and afterwards the Compton deliveries decreased (Tr. 354-355, 378-381).[9] Because of respondent's fraudulent delivery of a fuel oil/condensate mixture, Apco needlessly spent time and money duplicating the refinement of already refined fuel oil. In addition, the refining process produced too much fuel

[7] A distillation test is more complicated than the simple gravity and BS & W tests that normally were performed (Tr. 368, 376).

[8] Earlier, when the other company's fuel oil delivery was discovered, Hugh Bradley of Apco called respondent and asked if respondent likewise was delivering fuel oil. Respondent assured Bradley that he knew nothing about deliveries of fuel oil (Tr. 358).

[9] In March 1979, two FBI agents interviewed respondent as part of an investigation into allegations that various companies had sold fuel oil to Apco in 1977 and had falsely certified that it was crude oil (Tr. 291-293). Respondent told the agents that Compton had sold oil to Apco in 1977, but he maintained that he had sold virgin crude oil, not fuel oil certified as crude. Respondent also told the agents that if he had discovered that Compton was selling fuel oil, he would have immediately terminated the deal (Tr. 294).

oil for Apco's needs and an insufficient amount of gasoline (Tr. 357, 378, 403).[10]

2. In his own defense, respondent admitted that he had knowingly purchased fuel oil from Prime Resources, but he claimed that he thought that such fuel oil could legitimately be certified as crude oil. He based this contention on his knowledge that crude oil had been sold in the past as fuel oil, from which he concluded that the reverse could be true. Alternatively, he said that he believed that if condensate were blended with fuel oil, the result would be the equivalent of a barrel of crude oil (Tr. 477-478, 484, 527).[11] Because he had received no complaint from Apco prior to September 1977, he said that he believed that Apco was pleased with the stream of oil he was supplying (Tr. 495). Respondent admitted that he had lied to Heavin, Bradley, and the FBI agents by saying that he had not sold fuel oil to Apco (Tr. 487, 496-497, 515-518), but he maintained that the composite stream of oil he had provided to Apco was better than what Apco otherwise was receiving (Tr. 494).

[10] Throughout this period, Apco filed monthly reports with the FEA concerning the amounts of crude oil that Apco thought it was refining (Tr. 431, 434). Using those reports and similar ones filed by other crude oil refiners, the FEA determined the average monthly price of crude oil per category. Those refiners who had access to cheaper oil then had to purchase entitlements, *i.e.*, pay into a fund, while those who paid more than the national average received rebates from this fund. The purpose of the entitlements program was to equalize the cost of crude oil among all refiners nationwide (Tr. 370-371, 431-433). Refiners were not suposed to report fuel oil that they received, and they were not entitled to any compensation for purchases of fuel oil (Tr. 433-434, 439-440). The Apco official in charge of regulatory compliance testified that the company would have to return the entitlements payments it received in connection with the fuel oil deliveries (Tr. 440).

[11] An Apco chemist had previously testified, however, that condensate—the additive respondent relied on to support his claim that his stream of oil was equivalent to crude oil—had very little use in the refining process and did not yield useful products (Tr. 416-417).

3. In closing argument, the prosecutor summarized the evidence against respondent. Respondent's attorney began his own summation by arguing that respondent's case had been presented unfairly by the prosecution, and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison [the jury's] minds unfairly" (Tr. 542). He went on to charge the prosecution with "reprehensible" conduct in purportedly attempting to cast a false light on respondent's conduct (Tr. 543). Defense counsel also pointed to the prosecution table and said, "I submit to you that there's not a person in this courtroom, including those sitting at this table, who think that [respondent] intended to defraud Apco" (Tr. 543-544). Finally, near the conclusion of his argument, respondent's attorney said that respondent had been the only person in the case who had acted with "honor and integrity" (Tr. 547).

In rebuttal, the prosecutor responded to defense counsel's claim that the government did not believe in its own case by saying (App. A, *infra*, 9a; Tr. 549):

> I think [defense counsel] said that not anyone sitting at this table thinks that [respondent] intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.

After reviewing some of the evidence against respondent, the prosecutor then said, "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember what they said and what he admitted they said. I think it's a fraud" (App. A, *infra*, 9a; Tr. 549-550).

Government counsel also responded to defense counsel's claim that Apco had not suffered any loss in the FEA's entitlement program; the prosecutor said that he thought that Apco would have to make some kind of restitution (App. A, *infra*, 9a-10a; Tr. 550-551). Finally, the government attorney addressed counsel's claim that only respondent had acted with honor and integrity. The prosecutor briefly reviewed some of respondent's conduct and suggested that such conduct did not constitute honor and integrity and that the jury would not be doing its duty by ignoring the court's instructions and acquitting on such a concept (App. A, *infra*, 10a; Tr. 552). Respondent's attorney did not object to any of these statements.

4. Despite respondent's failure to object at trial, the court of appeals held that the prosecutor's statements constituted misconduct and warranted reversal (App. A, *infra*, 10a). The court rejected the government's argument, based on this Court's decision in *Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958), that the prosecutor's statements were invited by respondent's attorney's own arguments. The court said instead that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (App. A, *infra*, 11a). Judge McWilliams dissented without opinion (*ibid.*).

The court also denied the government's rehearing petition by the same vote (App. B, *infra*, 12a).

In that petition, the government argued that the court of appeals had erred in not considering whether the prosecutor's statements were harmless in light of the total record, particularly since there was overwhelming proof of respondent's guilt. In connection with that argument, the government called the court's attention to this Court's then pending consideration of a similar issue in *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).[12] In addition, the government argued that the court of appeals had erred in finding the prosecutor's arguments to be "plain error" when respondent's counsel's failure to object had deprived the district court of an opportunity to remedy any purported error. Finally, the petition noted that the decision below appeared to be inconsistent with this Court's decision in *Lawn*, *supra*, and other court of appeals' decisions after *Lawn*. The court denied rehearing without opinion (App. B, *infra*, 12a).

REASONS FOR GRANTING THE PETITION

Defendant's convictions for mail fraud and making false statements to a government agency were reversed by a divided panel of the court of appeals on a finding that certain comments made by the prosecutor during rebuttal argument, though not objected to at trial, were plain error. The comments were in direct response to improper remarks by defense counsel placing the good faith of the prosecution in issue. The court held that the prosecution has no right of reply to improper defense remarks. The court made no finding of prejudice to the defendant, and did not address the government's argument that the comments, if error, were harmless. The decision

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[12] *Hasting* was decided before rehearing was denied below.

thereby directly conflicts with decisions of this Court concerning a prosecutor's right to reply to improper arguments by the defense (*Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958)), the defendant's obligation to object to improper remarks by the prosecutor at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)), and the appellate courts' duty to consider whether any trial error is harmless (*United States* v. *Hasting*, No. 81-1463 (May 23, 1983)).

The decision of the court of appeals has serious implications for the administration of the criminal justice system in the federal courts, conflicts with numerous decisions of other circuits, and warrants review by this Court.

1. In *Lawn*, 355 U.S. at 359-360 n.15, this Court held that a defense counsel's closing argument that attacked the government's good faith in bringing the prosecution and accused two key government witnesses of being perjurers "clearly invited the [prosecutor's] reply," in which the government vouched for the witnesses' credibility.[13] Most courts of appeals have followed *Lawn* and have held that a prosecutor's arguments made in response to attacks by defense counsel in closing argument do not constitute reversible error. *E.g.*, *United States* v. *Trujillo*, No. 82-6036 (11th Cir. Sept. 9, 1983); *United States* v. *Harrison*, No. 82-5031 (4th Cir. Sept. 6, 1983); *United States* v. *West*, 670 F.2d 675, 688-689 (7th

[13] Similarly, in *Socony-Vacuum Oil Co.*, this Court recognized the legitimacy of prosecutorial comments vouching for the government's belief in the defendant's guilt, as a "rebuttal" to defense arguments placing the government's views at issue (310 U.S. at 242), though in that instance the Court found that the particular comments "overstep[ped] the bounds" (*ibid.*).

Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *United States* v. *Schwartz*, 655 F.2d 140, 142 (8th Cir. 1981); *United States* v. *Praetorious*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Sullivan*, 421 F.2d 676, 677 (5th Cir. 1970) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966). See also ABA, Standards for Criminal Justice 3-5.8, commentary at 3.91 (1980) ("[A] prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation.").

The prosecutor's statements in this case fall easily within the government's right of reply recognized in *Lawn*. As in *Lawn*, it was defense counsel who raised the issue of the prosecutor's personal beliefs. In his closing argument, respondent's counsel asserted that "there's not a person in this courtroom including those sitting at this table [the prosecutors] who think that Billy Young intended to defraud Apco" (Tr. 543-544).[14] Having placed the prosecutor's good faith in issue, respondent opened the door for the prosecutor's direct response (Tr. 549, 550):

[14] The comment by defense counsel in *Lawn* was similar: "that the United States Attorney and his assistant in charge of the case 'had been instructed, or in my opinion they never would have done this' " (355 U.S. at 359-360 n.15).

> I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
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> * * * * *
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> I don't know what you call that, I call it fraud. You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud.

Similarly, the prosecutor's comments on respondent's "honor and integrity" and his reminder to the jury that their duty is "in finding facts as opposed to the law" (Tr. 552) were in response to defense counsel's argument to the jury that respondent was "the only one in this whole affair that has acted with honor and integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (Tr. 547).

Under these circumstances, "the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion." *United States* v. *LaSorsa*, *supra*, 480 F.2d at 526. As the Second Circuit has stated, "in light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements * * * were understandable if not laudable." *United States* v. *Perry*, 643 F.2d 38, 51 (2d Cir.), cert. denied, 454 U.S. 835 (1981).

The court of appeals appeared to recognize that the defense comments were "improper conduct" (App. A, *infra*, 11a), but it nevertheless refused to apply

this Court's holding in *Lawn*.[15] Instead, the court followed the Tenth Circuit's line of cases, developed without reference to *Lawn*, which holds that "even if improper argument is made by defense counsel, the door is not thereby opened to similar conduct by the prosecution." See *United States* v. *Rios*, 611 F.2d 1335, 1343 (1979); *United States* v. *Latimer*, 511 F.2d 498, 503 (1975); *United States* v. *Ludwig*, 508 F.2d 140, 143 (1974).[16] Indeed, the court below emphasized the per se nature of its rule when it said (App. A, *infra*, 11a) that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court,

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[15] The government's brief on appeal expressly relied (Br. 15) on *Lawn* for its argument that the rebuttal comments were invited by defense counsel's statements in his summation. The court of appeals did not cite *Lawn*, but simply followed contrary Tenth Circuit precedent.

[16] The Tenth Circuit's current position evolved indirectly, through dictum, without citation to *Lawn* or to decisions of any other circuit. The rule was first announced in *Ludwig* (508 F.2d at 143). However, the government in *Ludwig* did not argue that the prosecutor's comments at issue were a permissible response to defense comments, but conceded they were in error. The government's argument—rejected by the court—was that the error was harmless "in view of numerous complaints directed against defense counsel's own conduct" (*ibid.*). In *Latimer*, the court faced the issue of improper response to a *proper* argument by the defense (see 511 F.2d at 503), quoting the *Ludwig* rule in dictum. Finally, in *Rios*, the court concluded that the record did not support the government's claim that the prosecutor's comment was in response to the defense (611 F.2d at 1343). Thus, the court's statement of the general rule against a prosecutor's right to reply (*ibid.*) was dictum. The instant case is apparently the first in which the rule has been employed in clear contravention of *Lawn*.

not a similarly improper response." This per se rule clearly conflicts with this Court's decision in *Lawn* and with the rule generally followed by the other circuits; it should be corrected.[17]

2. Even assuming arguendo that the court below was correct in finding that the prosecutor's rebuttal argument was improper, the court was still wrong in finding that those comments, which were not objected to at trial, were proper grounds for reversal on appeal. This Court has held that "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *Socony-Vacuum*, 310 U.S. at 238-239; see *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). The "plain error" exception to this rule, set out in Fed. R. Crim. P. 52(b), must "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). If a defendant has failed to object to the prosecutor's statements to the jury at the time they were made, an appellate court may not reach an error contained in them unless it is ' "obvious' " or if it would " 'otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Socony-Vacuum*, 310 U.S. at 239,

[17] Moreover, we dispute the court of appeals' apparent assumption that an objection is as effective as a response in nullifying the impropriety of the defense argument. Advice to the jury that the defense argument is improper, while chastising counsel, does not answer the factual assertion of prosecutorial hypocrisy made in such an argument. In our view, fairness requires that the prosecution itself be permitted to respond.

quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); accord, *Frady*, 456 U.S. at 163 n.13.

The court of appeals apparently concluded that the prosecutor's comments in this case constituted "plain error" simply on the ground that the subject of improper prosecutorial comments had been addressed frequently and forcefully by that court on previous occasions (App. A, *infra*, 10a):

> Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal.

In fact, however, plain error cannot be found on the basis of the nature of the error alone; "each case necessarily turns on its own facts" (*Socony-Vacuum*, 310 U.S. at 240). Here, the court of appeals failed to consider whether the error, if it was error, "affect[ed] substantial rights" of the respondent. See Fed. R. Crim. P. 52(b). The court made no showing whatever that, in the context of this trial, respondent was prejudiced by the remarks.[18] After all, the trial court cautioned the jury at the beginning of trial that arguments of counsel were not evidence (Tr. 21), and, as we have shown, the prosecutor could properly—even if erroneously—have believed that his responses were sanctioned by *Lawn*. Consequently, appellate consideration of the prosecutor's comments, which were not obviously prejudicial and which respondent did not see fit to mention at trial, was unwarranted under the doctrine of plain error. Respondent's fail-

[18] We show in Point 3, *infra*, that the prosecutor's remarks could not reasonably be found to have been prejudicial to respondent.

ure to object at trial should have been held fatal to his claim. *United States* v. *Perry, supra*, 643 F.2d at 51; *Whitehorn* v. *United States*, 380 F.2d 909, 913 (8th Cir. 1967).

A closing argument is a particularly inappropriate area in which to disregard the requirement of a timely objection. The impact on the jury and attendant prejudice to the defendant depend to a large extent on factors such as tone, gestures, and emphasis, not perceptible on the cold record before an appellate court. Because of these factors, the judge and counsel at trial are in the best position to assess whether prejudicial error has occurred. But here neither the district court nor respondent's attorney saw anything improper in the prosecutor's statements at the time they were made. That casts considerable doubt on the proposition that the statements were so egregious that they led to a "miscarriage of justice" (*Frady*, 456 U.S. at 163). Appellate consideration of a trial court error such as this, which is not obviously prejudicial and which the defense did not mention at trial, has been condemned by this Court as "extravagant protection." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.12 (1977); *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

Moreover, reversal of a conviction on the basis of prosecutorial comments not objected to at trial undermines the purpose of the contemporaneous objection requirement. As this Court has noted, "[o]rderly procedure requires that the respective adversaries' views * * * be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error" (*Henderson* v. *Kibbe*, 431 U.S. at 154).[19] As one judge has observed:

[19] Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). ("Any procedural rule which encourages the result that [trial court] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification".)

> [C]ounsel have a duty to the court, an obligation at least to permit the judge to conduct a trial that finally determines the question at issue. A defendant may not remain silent in response to error and take his chances with the verdict before moving for a mistrial. Nor may he permit error to go unchallenged, then ask the appellate court to reverse the conviction.

United States v. *West*, 680 F.2d 652, 658 (9th Cir. 1982) (Wright, J., concurring). This point has special force in the case of curable errors. Had defense counsel in this case lodged an objection at trial, the district court would have been able to give a cautionary instruction to the jury, thereby curing any error that might otherwise have occurred. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974).[20] Since respondent's attorney did not object, however, the trial court had no occasion to issue an instruction. For

[20] In *Donnelly* the Court considered the prejudicial impact of an improper closing argument by a prosecutor, who had stated that the defendant hoped that the jury would find him guilty of something other than first degree murder (416 U.S. at 640). Because the prosecutor and the trial judge had cautioned the jury that the argument was not evidence, and because the trial court had given a cautionary instruction in response to the defendant's objection, this Court did not find the argument to justify reversal of the conviction on habeas review. The Court observed that "[a]lthough some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character" (*id.* at 644). If the argument in *Donnelly* was capable of being cured by a cautionary instruction, then the remarks in question here should certainly be considered susceptible to correction.

the court of appeals to reach respondent's claim notwithstanding his failure to object, in the absence of a showing that the prosecutor's comments caused a miscarriage of justice, frustrates the purposes of the contemporaneous objection requirement. *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Kravitz*, 281 F.2d 581, 587 (3d Cir. 1960), cert. denied, 364 U.S. 941 (1961).

This Court has observed that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (*Henderson* v. *Kibbe*, 431 U.S. at 154). It should be even rarer to find an instance in which a prosecutor's argument, not objected to at trial, justifies reversal. Not only is the error as easily correctible at trial as is the jury instruction (see *Donnelly* v. *DeChristoforo*, 416 U.S. at 644), but it is *less* susceptible to accurate assessment on an appellate record, and *less* likely to be prejudicial to the defendant. "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence," do not reach the proportions of a miscarriage of justice. See *id.* at 646; *United States* v. *Foster*, 711 F.2d 871, 883 (9th Cir. 1983).

3. The court of appeals reversed respondent's conviction without any determination whether respondent was prejudiced by the prosecutor's statement or whether, in the context of the total record, the challenged argument could be deemed to be harmless error. In *United States* v. *Hasting* this Court made clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (slip op. 9; see also *id.* at 10 n.7). The decision clarified and reaffirmed a principle of long standing. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7), a category that undoubtedly includes improper summation arguments by the prosecutor, as *Hasting* itself bears out.[21] See also, *e.g.*, *Socony-Vacuum*, 310 U.S. at 242; *United States* v. *Foster*, 711 F.2d at 883; *United States* v. *Flaherty*, 668 F.2d at 598. The decision below thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless error analysis.[22]

The failure of the court of appeals to consider whether the prosecutor's comments prejudiced respondent's "substantial rights," as required under Fed. R. Crim. P. 52(b), exacerbates its disregard for the need to consider the possibility that the error,

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[21] *Hasting* concerned a prosecutor's reference during summation to the defendants' failure to testify.

[22] The decision below is also, we submit, in violation of 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties," and of Fed. R. Crim. P. 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

if any, was harmless. The bare finding of "plain error," with no discussion of actual prejudice to the defendant, no more establishes the existence of prejudice than does a straight reversal accompanied by no consideration of the harmlessness of the error (as in *Hasting*). Indeed, the fact that the error complained of was not objected to at trial heightens the appellate court's obligation to consider the trial record as a whole before reversing. When no prejudice was apparent to the participants during the trial, an appellate court surely bears a special responsibility to assay the record and weigh the consequences of the perceived error before reversing and requiring a retrial.

While this Court, if it concludes that there was error and that the failure to object was not fatal to respondent's claim, may prefer to remand to the court of appeals for consideration of the harmfulness of the error of the prosecutor's comments, we believe that there can be no question that the prosecutor's comments did not substantially prejudice appellant's rights in the circumstances of this case. First, the trial court cautioned the jury at the outset of the trial that the lawyers' arguments were not evidence. Second, the jury was undoubtedly aware that the prosecutor was an advocate and thus likely discounted much of his argument as the viewpoint of a party to the litigation. See *Donnelly* v. *DeChristoforo*, 416 U.S. at 640 n.7. Finally, and most importantly, the evidence against respondent was overwhelming. Not a single witness supported his defense that fuel oil mixed with condensate is equivalent to crude oil, and several witnesses expressly disavowed that position. It was beyond question that respondent failed to advise Apco of what he actually was supplying

and that the oil he supplied did not meet the requirements of his contract. Moreover, the evidence conclusively showed that respondent engaged in activities to conceal his scheme; he used an intermediary to recertify the fuel oil as crude oil, furnished a quantity of condensate each month to raise the gravity level of the oil he supplied to Apco, and concededly lied in response to inquiries from both Apco and government investigators. Under those circumstances, there was clear evidence of respondent's guilt. Cf. *Socony-Vacuum*, 310 U.S. at 239-240.

Not only was there strong evidence of respondent's guilt, but the error of the prosecutor's remarks was at most exceedingly marginal. As we have pointed out, the comments with which the court of appeals found fault were in fact prompted by defense counsel's own argument. Even if we are wrong in the view that the argument was fair response, it is scarcely possible that the prosecutor's remarks could have materially influenced the verdicts against respondent. The prosecutor's statements concerning his belief that a fraud had been committed were nothing more than a statement of the obvious.[23] And his statement that Apco might well have to make restitution under the entitlements program was supported by the evidence (see Tr. 440). Finally, the prosecu-

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[23] Ordinarily, the principal risk of prejudice from prosecutorial assertions of personal belief in a defendant's guilt arises from the possibility that the jury will infer from such comments the prosecutor's possession of other information, not placed in evidence at trial, supporting such a conclusion. See *United States* v. *Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981); *United States* v. *Greer*, 467 F.2d 1064, 1072 (7th Cir. 1972), cert. denied, 410 U.S. 929 (1973). In the circumstances of the instant case, there plainly was no such danger.

tor's ambiguous statement urging the jury not to acquit on a basis contrary to the trial court's instructions and contradicting defense counsel's claims that respondent alone had acted with honor appear responsive to what amounted to a defense plea for jury nullification and could not have prejudiced respondent.

No citation of authority is needed for the proposition that the federal criminal justice system is overburdened, and that the scarcity of resources threatens the interests both of society and of criminal defendants as a class. A decision such as the instant one, by requiring retrial of a case on account of unobjected-to "error" that carried with it little potential for prejudicing the defendant's right to a fair trial and an accurate verdict, further burdens the system. The decision is especially difficult to justify because it was reached without consideration of the principles laid down in numerous decisions of this Court, and generally followed by the other courts of appeals, regulating disposition of issues of the sort presented by this case. Under the circumstances, the Court can, we believe, make a material contribution to the fair and efficient administration of federal criminal justice by undertaking review of this case. And because the principles that govern the disposition of the issues presented herein appear to be relatively well settled, the Court may deem summary reversal appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1536

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY G. YOUNG, DEFENDANT-APPELLANT

[Filed Feb. 22, 1983]

Appeal from the United States District Court
For the Western District of Oklahoma

(D.C. CR-80-175-E)

Before SETH, and MCWILLIAMS, Circuit Judges, and BRIMMER *, District Judge *

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* Of the United States District Court for the District of Wyoming, sitting by designation.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Appellant Young, as vice-president and general manager of Compton Petroleum Corporation (Compton Petroleum), entered into a contract to sell crude oil to Apco Oil Corporation in late 1976. Deliveries under the contract were made between January 1977 and September 1977; but what Apco Oil Corporation actually received from Compton Petroleum consisted of a mixture of fuel oil and condensate crude oil, even though the product had been designated and certified throughout as low sulpher [sic], or Oklahoma "sweet" crude. The evidence indicated that about half of the oil delivered under the contract, approximately 117,250 barrels, was actually fuel oil. Additionally, in reliance on the designation of the oil purchased from Compton Petroleum as crude, Apco filed tallies of the amount of crude oil that it believed it was refining with the Federal Energy Administration, in compliance with government regulations. These incorrect figures were used by the FEA in establishing the national averages of tier categories of oil refined each month for purposes of equalizing the cost of crude oil under its entitlements program.

Compton Petroleum and Billy G. Young, the Appellant, were charged by indictment with eleven counts of mail fraud under 18 U.S.C. § 1341, three

counts of willfully and knowingly making false statements to a government agency under 18 U.S.C. § 1001, one count of interstate transportation of stolen property under 18 U.S.C. § 2314, and were also charged with aiding and abetting in the commission of all fifteen counts under 18 U.S.C. § 2. A plea of *nolo contendere* was accepted from Compton Petroleum on the entire indictment and a fine was imposed. Young was tried before a jury in the Western District of Oklahoma. At the close of evidence, Count Ten of the Indictment, alleging mail fraud, was dismissed. Subsequently, the jury returned a verdict of guilty on the mail fraud and false statement charges. The Appellant was acquitted of interstate transportation of stolen property. On appeal, Appellant argues that the trial court erred in admitting statements made out of court by a person no longer living at the time of trial. It is further contended that the Appellant was unfairly prejudiced by remarks made during closing rebuttal argument by the prosecutor.

During the course of the trial, statements made out of Court by Homer Reves, the chief accountant and office manager at Compton Petroleum during the period that the alleged criminal activity took place, were received as evidence, despite the fact that Homer Reves had died more than three years prior to trial. These were statements Reves had made to accountants working under him, which the Government claims were properly admitted as admissions of an agent of a party opponent under Fed. R. Evid. 801(d)(2)(D). Appellant contends that there is no indication that Homer Reves was his employee or agent and that the Court improperly considered Reves as such simply because the Appellant, as vice-president

of Compton Petroleum, was higher in the corporate chain of authority.

Ordinarily the statement of an accountant made regarding his employment with a party will not be considered hearsay under Rule 801(d)(2)(D), even in a criminal case. *United States* v. *Diez*, 515 F.2d 892, n. 4 (5th Cir. 1975); *Hayes* v. *United States*, 407 F.2d 189 (5th Cir. 1969). The fact that the statement was made by a corporate employee to another corporate employee, rather than to a third party, would not preclude the admission of that statement against the corporation under Rule 801(d)(2)(D). *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978). However, when such a statement is offered against another corporate employee, instead of the corporation, proper admission under Rule 801(d)(2)(D) will necessarily depend on the nature of the relationship between the declarant and the defendant. *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974), cert. denied, 419 U.S. 826; *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973).

Obviously, expanding the rule to include statements made by any person who is subordinate to a party opponent may create a loophole in the hearsay rule through which evidence not contemplated by the authors of Rule 801 could be admitted. On the other hand, if the factors which normally make up an agency relationship are present, the evidence should not be excluded simply because the statement is offered against a corporate officer, rather than the corporation. Here the prosecution inquired into the relationship between Billy Young and Homer Reves on examination of the two accountants who worked

under the deceased declarant during the period in question. Johnnie Milton Huff testified as follows:

Q. Allright, sir. Who was your boss at Compton Corporation?

A. I worked primarily for Bill Young.

Q. And who made the decisions at Compton Corporation so far as you knew?

A. So far as I knew making contract negotiations Bill did that. Bill was in charge of the operations. (Tr. 201.)

Lennox K. Bird also worked as an accountant under Mr. Reves. He testified as follows:

Q. Who told you what to do?

A. Homer Reeves.

Q. And who old Homer Reeves what to do?

A. After—well, that would come from Bill Young.

Q. All right. And is that Mr. Young seated over here in the gray suit?

A. Yes.

Q. All right. May the record show he's identified Mr. Young. How about Mr. White, did Mr. White visit the site at Abilene to tell you or Mr. Reeves what to do or anyone that you ever saw? Did you ever see him telling anyone what to do down there?

A. Not to the best of my knowledge, no.

* * * * *

Q. Who told you what to do during Mr. White's presidency?

A. Well, again I worked for Homer Reves directly.

Q. Yes, sir.
A. And that's where I received my orders up until his demise.
Q. Yes sir. And who gave Mr. Reves his directions during Mr. White's presidency?
A. Again, he was under Mr. Young.

This evidence was sufficient to establish an agency relationship between Mr. Young and Mr. Reves for purposes of admitting the statements under Rule 801 (d) (2) (D). The testimony was therefore not hearsay and was properly admitted.

Despite the evidentiary propriety of the admission of statements made by Homer Reves, there remains the issue of whether the receipt of such testimony deprived the Appellant of his Sixth Amendment right to confront witnesses testifying against him. The inability to cross-examine a declarant attains particular significance in light of the fact that declarations admitted under Rule 801(d) are defined out of the hearsay rule as a matter of estoppel, as opposed to being excepted from the rule as independently reliable statements. See *United States* v. *Porter*, 544 F.2d 936 (8th Cir. 1976); *United States* v. *Robinson*, 546 F.2d 309 (9th Cir. 1976), cert. denied, 430 U.S. 918; Louisell and Mueller, *Federal Evidence*, § 423.

The general rule applied in such situations comes from *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which involved testimony taken at a preliminary hearing on direct examination by the Defendant's attorney and admitted at trial after attempts to find the same witness failed. The court noted that, once it is shown that a witness is not available, "the Clause countenances only hearsay marked with such trustworthiness" which will guarantee "no material departure

from the reason of the general rule." Justice Blackmun stated the majority position:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in cases where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 448 U.S. at 66.

A review of the case law on this issue indicates that a case-by-case analysis of the circumstances under which such testimony is offered is required. See *Dutton* v. *Evans*, 400 U.S. 74 (1970); *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir. 1977); cert. denied, 434 U.S. 940.

In a case with facts similar to this, it was held that statements made by a witness who died prior to trial would be admissible under Rule 801(d) (2) (A), (B), and (E). Regarding the applicability of the Confrontation Clause, the court relied on the criteria set forth in *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir. 1977), cert. denied, 434 U.S. 940:

> A highly relevant consideration is the degree of prejudice imposed upon the fact-finding process by the declarant's nonavailability. We should consider whether the out-of-court statement bears traditional indicia of reliability, whether it was crucial to the government's case, whether the jury had an opportunity to weigh the credibility of the extrajudicial statement, and whether ap-

> propriate instructions were given by the trial judge. 553 F.2d at 1119 (Citations omitted).

Other factors considered in *Scholle* included whether the context of the statement and the identity of the person spoken to bolstered the reliability of the statement. Any motive that the declarant might have had for lying when the out-of-court statement is made is also relevant. Finally, any indication of a failure of memory, perception, or expression should be taken into account.

Here, it is significant that the two witnesses who had worked under the direction of Homer Reves testified to essentially the same thing. The context in which the statements were made and the parties to which they were addressed were properly set forth. Neither of the witnesses had any reason not to tell the truth about what had been said to them. The statements were made in the context of the manner in which Compton Petroleum was performing under its contract with the buyer of the oil and were not bold assertions that fraud was being committed. All of this would lend to their reliability. Also, an examination of the record indicates that no less than five other witnesses testified as to the impropriety of the Appellant's conduct. Thus, the challenged statements were cumulative upon a substantial body of evidence tending to prove the same point. This goes far in mitigating any prejudice which might have accrued to the Appellant. Finally, the jury was properly instructed regarding their prerogative to assess the credibility of the witnesses before them and the weight with which any particular testimony may be considered. These factors, taken as a whole, indicate that the Appellant's Sixth Amendment right to confront witnesses testifying against him was not abrogated by the admission of the statements of the deceased accountant.

During his final argument to the jury, the prosecutor made several statements regarding his personal opinion of Mr. Young's guilt. He also made one incorrect reference to the amount by which the Appellant was said to have profited from the activities for which he was indicted. Although no objection was entered by counsel for the Appellant at the time the remarks were made, it is still argued that the prosecutor's conduct substantially prejudiced the Appellant at trial. A review of the trial transcript shows that the prosecutor did indeed put his personal beliefs at issue, as the following statements indicate:

> I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
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> • • • • •
>
> I don't know what you call that, I call it fraud. You can look at the evidence and you can remember what they said and what he admitted they said. I think it's a fraud.
>
> • • • • •
>
> He said—Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they're going to come

back. All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. That's what I think.

* * * * *

I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.

These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the Appellant's intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the Appellant guilty. The issue has come before this Court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10th Cir. 1975); *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10th Cir. 1974).

Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal. *United States* v. *Ludwig*,

supra. The Government argues that the prosecutor's comments were merely a reply to the defense counsel's assertion during his closing argument that no one at the prosecutor's table really believed that the defendant had the intent to defraud. Yet, the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response. As stated in *United States* v. *Ludwig*, *supra*:

> The government concedes error in this emphatic and personalized vouching for the integrity of the state police but urges us to hold the error to be harmless in view of numerous complaints directed against defense counsel's own conduct. We can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel. 508 F.2d at 143.

See also *United States* v. *Rios*, *supra*, *United States* v. *Latimer*, *supra*.

In accordance with the foregoing, the judgment and conviction must be and hereby are reversed and remanded for a new trial.

Judge McWilliams dissents.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAY TERM—June 20, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Court Judges, and Honorable Clarence A. Brimmer, Jr.*

No. 81-1536

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

BILLY G. YOUNG, DEFENDANT-APPELLANT

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by Judges Seth and Brimmer, to whom the case was submitted. Judge McWilliams, also on the panel, voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of

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* District Court Judge of the United States District Court for the District of Wyoming, sitting by designation.

Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS
Clerk

By /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

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CLERK

No. 83-469

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY G. YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October, 1983

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QUESTION PRESENTED

Did the Court of Appeals err in reversing and remanding the case for new trial on the ground that the prosecuting attorney's statements of his personal belief in respondent's guilt constituted prosecutorial misconduct?

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No. 83-469

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY G. YOUNG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Billy G. Young was charged by indictment with willfully and knowingly devising a scheme and artifice to defraud APCO Oil Corporation and to obtain money and property by false and fraudulent pretenses. Young's defense was that he was totally without fraudulent intent. His evidence stood for the proposition that his actions were done in good faith and without the requisite *mens rea* to support a criminal conviction. The government witnesses who were personally acquainted with Billy Young testified to his outstanding honesty and integrity (Tr. 57, 115, 331, 359).

The jury returned a verdict of guilty against Billy Young because of prejudicial misconduct in the closing rebuttal argument by the prosecuting attorney. The prosecuting attorney's argument was outrageously improper. He told the jury he personally believed in Young's guilt, and stated that it was the duty of the jurors to find Young guilty.

The Court of Appeals held the prosecutor's statements constituted prosecutorial misconduct and were so egregious as to constitute plain error. The case was reversed and remanded for new trial.

The Government takes liberties with the record in the portion of its petition entitled "Statement." Such "Statement" contains flat misstatements of the record. The Government's lengthy recital of its version of the trial is not material to the issue presented. Therefore, a detailed rebuttal will not be set forth.

ARGUMENT

The petition is without merit. The petitioner has not advanced or suggested any valid basis for this Court to grant a review on writ of certiorari. The considerations governing review on certiorari as set forth in this Court's Rule 17 are not met. This case involves nothing more than a single prosecutor running amuck. There is no conflict with any other circuit. There is no constitutional question involved. The decision merely holds that the respondent was denied a fair trial because of prosecutorial misconduct. Set out below are examples of the prosecutor's expressions of his personal belief in respondent's guilt which virtually

forced an intimidated jury to return a verdict of guilty against Billy Young:

> "I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got $.85 a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
>
> * * *
>
> "I don't know what you call that, I call it fraud.
>
> "You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said, I think it's a fraud.
>
> * * *
>
> "He said — Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they are going to come back. All that money that Apco got for this stripper and new oil, Al Greene at the Apco trust he's going to get some kind of invoices. That's what I think.
>
> * * *
>
> "Well, Mr. Bailey said that Mr. Young acted with honor and integrity in this case, he was the only one that did it. Well, he got all of his friends at Compton involved in this thing and he told his friends at Apco, Hugh Bradley, Don Heavin, said, no, I'm not selling you fuel oil. I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that

this judge is going to instruct you, you think that's honor and integrity then stand up here in an Oklahoma courtroom and say that's honor and integrity; I don't believe it." (Tr. 549-552).

The Tenth Circuit Court of Appeals had this to say about the prosecutor's statements:

> "These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the appellant's intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the appellant guilty. The issue has come before this court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10 Cir. 1979); *United States* v. *Latimer*, 511 F.2d 498 (10 Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10 Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10 Cir. 1974)." Pet. App. A, p. 10a.

The Court of Appeals went on to state:

> "Considering the position of this court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error." Pet. App. A, p. 10a.

Improper conduct of this type by the prosecutor puts defense counsel in an untenable position before the jury. In this case, from opening statement through closing argument, defense counsel had commented on the prosecutor's unfair and incorrect characterization of the evidence. Objections directed to a point that has already been so heavily emphasized can be counter-productive and can bring about the very result they are designed to prevent. That

is one of the reasons for the plain error rule. In short, at the point of the prosecutor's closing rebuttal argument, defense counsel is in a no-win situation; if objection is overruled, it undercuts the entire protest defense counsel has previously made, and if sustained, the damage has been done and defense counsel is made to appear as protesting too much. The only remedy for such clear abuse is insistence upon lawful and ethical prosecutorial behavior, enforced by the plain error rule. These points were emphasized many years ago by this Court in *Berger* v. *United States*, 295 U.S. 78, 79 L.Ed. 1314 (1935). The matter can hardly be put more clearly than it was in that case:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
>
> • • •
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.
>
> • • •
>
> "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. at 88, 89.

It is inconceivable that this Court would sanction the prosecuting attorney's behavior in this case. It is almost

as inconceivable that the Government would argue, as it does, that the Tenth Circuit decision is "contrary" to *Lawn* v. *United States*, 355 U.S. 339 (1958). (The Government states, "The court of appeals did not cite *Lawn*, but simply followed contrary Tenth Circuit precedent." Pet. p.15 n.15).

The Tenth Circuit's opinion is not contrary to *Lawn*. Further, the issue in this case is not related to the issue in *Lawn*. The Government's reliance on *Lawn* is based on a footnote which quotes the Government's attorney as saying in closing summation, "We vouch for [Roth and Lubben] because we think they are telling the truth." The footnote goes on to say, "The Government's attorney did not say nor insinuate that the statement was based on personal knowledge or on anything other than the testimony of those witnesses given before jury, and therefore it was not improper." Further, the footnote recites that there were corrective jury instructions.

Vouching for a witness has nothing to do with this case. If all the prosecutor had done here was vouch for a witness, the jury would not have convicted Billy Young. The comment in *Lawn* didn't remotely approach the situation here; i.e., the prosecutor's repeated statements of his personal belief in respondent's guilt. Nor was there any statement by the *Lawn* prosecutor that it was the duty of the jurors to convict.

The prosecutor's expressions of his personal belief in respondent's guilt were not only inherently reprehensible in and of themselves, but they were forcibly directed to the destruction of his good faith defense. They denied Billy Young a fair trial.

CONCLUSION

The decision of the Court of Appeals is predicated on well-established doctrine under a set of facts peculiar to this case. The petition presents no issue warranting review by this Court. It should be denied.

Respectfully submitted,

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October, 1983

CERTIFICATE OF SERVICE

I hereby certify that the following named persons, required by law to be served in this case, were this day mailed three (3) copies of the foregoing Brief in Opposition, postage prepaid.

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MAY 2 1984
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No. 83-469 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 19, 1983
CERTIORARI GRANTED FEBRUARY 21, 1984

14PP

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-469

UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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*The opinion of the court of appeals is printed in the appendix to the petition for writ of certiorari and has not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA *v.* BILLY G. YOUNG

CRIM. No. 80-175

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2.1.80	INDICTMENT
2.5.80	ENTER ARRAIGNMENT; local consl to ent app by 12-11-80; ents plea of NOT GUILTY as to ea of 15 cts;
3.9.81	ENTER JURY TRIAL: dft apps in per; ptys announce ready; jury duly empaneled & admonished; rule invoked on plf's mtn; plf & dft make opening stmt; plf presents case in chief w/test of wits; plf's exhs 1A & 1B, 5C, 5D, 5E, 5F, 5G, 5H, 5I, 6D, 6H adm; (6D-6H to be reoffered); ct adjourns to 3-10-81, 9 am (Eubanks)
3.12.81	ENTER FURTHER JURY TRIAL: dft apps in per; bailiff sworn; ct instructs jury; jury retires to del at 10:23 am; rets w/verdict of GUILTY on Cts 1-9, 13-15 & NOT GUILTY on ct 12 at 2:45 pm; is polled; is dischgd; bailiff to take jury to lunch at govt expense; dft to stand on present bond to wait sentencing (Eubanks)
3.12.81	VERDICT OF GUILTY on Cts 1 through 9, NOT GUILTY on ct 12 & GUILTY on cts 13 through 15
5.7.81	ENTER SENTENCING: sent to cust of AG for 2 yrs on ea of cts 1-9 & 13—15, ea ct to run concurrent; $1,000 fine on ea of cts 1-9, $10,000 fine on ea of cts 13, 14 & 15 (total fine of $39,000) purs to R.38(a)(3); fine to be paid as a condition precedent to an appeal; dft advised of right to appeal; bond fixed in amt of $5,000 C/S; stand on present bond; cts 10 & 11 to be dismd (Eubanks)

5.7.81	NOTICE OF APPEAL fm Judgm & Sent ent'd 5-7-81

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA *v.* BILLY G. YOUNG

No. 81-1536

DATE	PROCEEDINGS
5.15.81	Case docketed
12.23.81	Appellee's brief filed
2.22.83	Judgment is reversed. The cause is remanded to district court.
4.8.83	Appellee's petition for rehearing en banc filed
6.20.83	Denied appellee's petition for rehearing en banc—en banc panel
7.29.83	Appellee's motion to recall and stay mandate, pending cert., filed
8.23.83	Appellee's motion for continued stay of mandate filed and granted. Parties notified

[541] [CLOSING ARGUMENT ON BEHALF OF RESPONDENT]

THE COURT: All right. You may close the argument for the defendant, Mr. Bailey.

MR. BAILEY: Thank you, your Honor.

May it please the Court, ladies and gentlemen. [542] I thank you for your kind attention.

Billy's life is on trial. And he's led a blameless life. He's a fine citizen.

At the outset I told you that we would try to be fair with you, we wouldn't overstate it. We tried to develop the proof and the truth. And I think we've kept that commitment. Just put it up to you exactly the way it was. And I don't deal in personalities, it's not something a lawyer should do and a lawyer can't get mad, he loses respect. But I'm obligated as a lawyer to attack unfairness. And I submit to you that this case has been presented unfairly by the prosecution. From the very beginning in opening statements for statements were made like 90 percent is fuel oil, under cover of darkness, broken seals. Till this very moment the statements have been made to poison your minds unfairly. The government has an obligation to shoot straight with you and with people accused of a crime. The Constitution of this country and the United States Supreme Court requires that they develop exculpatory evidence, evidence that tends to show the innocence of those on trial. I'll leave it to you to determine whether this prosecution has done that. Any time it's been possible to leave an inuendo of wrong-doing when it was only a half truth or none at all that has been left with you. That exhibit is a fair example. The government would have you believe that that was the sales of Compton to Apco. And it's [543] not. The overwhelming bulk of the crude oil, of the product sold to Apco was crude oil. The regulations provide that it's 50 percent or more that's the component that you certify it. The attempt to make the case something that it isn't does no credit to the prosecution. It's a sad case but it is true that the behavior of the FBI is not commendable in this case. Gaining access by deceit. The power of the government is

so enormous brought to bear on an individual. Unless you have been in that position you can't comprehend the dimensions of it, of these people sitting out here.

The FBI agent and the enormous resources that they have bring to bear someone who has one person to represent them. And it's been brought to bear unfairly. And I think you will know that. Any time it was possible to leave the impression that there was a big profit being made it was left when they know that's not true. Any time it was possible to leave the impression that it was only fuel oil that went to Apco it was left when you know that's not so. Any time it was possible to leave any impression that would cast a bad light on Billy Young even though they knew it wasn't so that's what was done. And I submit to you it's reprehensible.

The indictment says that Billy Young is charged with intending to devise a scheme to defraud Apco and to obtain money and property by false and fraudulent pretenses. And I submit to you that there's not a person in this courtroom [544] including those sitting at this table who think that Billy Young intended to defraud Apco. Now, if you think that Billy Young intended to defraud Apco, if that was his scheme and intent, Billy Young is dead. But that's an element of this charge that the government is obligated to prove beyond a reasonable doubt. I submit to you folks as reasonable people that you have to hold reasonable doubt. Apco I submit to you wasn't defrauded. You recall that the blending of the high quality condensate which Mr. Young managed to buy and lost money on and there's no proof to the contrary here and I'm just going to be as frank as I tried to be all through this thing and the other crude oil that went into it was delivered to Apco from January '77 through to September and according to the chemist they tested and I forget how many times but they frequently tested it, there was never any complaint about it. Mr. Bradley said there was never any complaint about it until July or August, sometime in that time range of '77 when another purveyor, large supplier of that Cyril facility brought in pure burner fuel and the residual product of the refinery to increase. But in all the previous times Apco was

either entirely happy with what they were receiving. It didn't show up on the stock reports, they were getting the same gasoline and so forth they'd always gotten because of this blend and it just makes sense seems to me. In other words, there was no complaint about it. There is—I find no basis to suggest [545] to you that Apco was injured by anything that was sold to them by Compton. There's not a word of proof in this record that there was any loss to Apco on any entitlements program. That's simply—it's very complicated but simply a judgment procedure between refineries. And they—there was someone I think it was Mr. Hardy suggested, well, someone might come back on Apco yet. That happened four years ago. He knows that's not so. Apco didn't lose anything by it.

There is kind of a anomalous situation in the proof. There is no question, as I understand it, that if you take the low gravity crude that has about—I forget the numbers, real low, sometimes, I think, 18 degrees gravity, maybe even lower than that, you folks remember better than I do—and you blend it with the condensate or higher gravity crude, no one contends there's anything wrong with that. The government doesn't contend that as I understand it. It goes on all the time. That's the proof here. Now, the chemist didn't know that. I thought that was kind of interesting. But, there's no question apparently that goes on routinely all the time. Sometimes you have to do it to move the crude because it's set up so hard like tar it has to be blended down or heated so that it can be pipelined. There's nothing wrong with that. But if you take number four oil they're contending that's a higher gravity and higher quality and blending it with high quality crude and with condensate suddenly it becomes a crime.

[546] I submit to you as a matter, folks, in common sense and good judgment that that's inherently intolerable, illogical and should never be the basis for criminal prosecution.

Now, Billy is guilty of being a good friend of Ken Ross. There's no question, I submit to you, I think you all know this, that his motives were of the highest order. I think if you ever serve on a jury again this case will stick in your

mind. I never recall a case in 20 years of them where virtually every government witness that was called that knew Billy testified to his honorableness, his integrity, his rectitude and I say that makes the case unique. And it goes to undercut any contention that that man had any intention to defraud anybody.

You know, it's a heavy responsibility that a lawyer has in representing someone in a serious matter like this when a life is involved. And I wished I could do it better.

Billy never certified anything, neither did Compton. Look at what was certified to them. These counts of the indictment about false certification aren't true. There's not a syllable of proof in this that supports that. There's some attempt at some convaluted conspiracy but the government hasn't brought any of these people to testify to it. They tried to get it in through innuendos or hearsay but you don't hear it from Davis, Truitt Davis or Al Daigle or Rytenberry or any of these people, that's kind of left in limbo, and intention [547] for you to draw some kind of sinister concept from it which isn't there and doesn't exist. It would be interesting where they fit in the thing. There's certainly no evidence that implicates Billy Young in any scheme to get money. And any innuendos of that type are so unfair and so offensive. I submit to you you should not tolerate it.

These complex economic regulations should not have any place in an effort to put someone away. Billy didn't—they fish around for someone to make a deal like they got Mr. Ross and Billy to save his own neck by throwing someone else to the wolves. He's the only one in this whole affair that has acted with honor and with integrity. Pride as I told you in opening statement and Lancer's and these folks in Tulsa, they make the money and they make the deals with the government and Billy sits here. That's improper. That's unfair. And he had no intent to defraud anybody.

Well, I believe in the jury system and I don't just tell you that. You bring the combined life experience, common sense to some, what, 300 years or something to this case. When you go in that jury room you are not required to leave your common sense outside. You take that in with

you. And when you do I'm confident that you will do the right thing and return a verdict of not guilty because he is not.

Now, when I sat down it is the law and this jurisdiction as Judge Eubanks explained to you that Mr. Hardy will [548] get up and talk to you again. And it's a good law. They have the burden of proof beyond a reasonable doubt and they get two bites at the apple. But nothing he says, whatever it is, can be addressed by me to rebutt. Now, I request that you give him your careful attention as you have me and that you hold in mind when you come back in the morning and receive the Judge's instructions these matters that I have talked to you about and return a judgment of not guilty.

Thank you.

THE COURT: Thank you, Mr. Bailey.

[GOVERNMENT'S REBUTTAL ARGUMENT]

Yes, go ahead, Mr. Hardy, and close the argument for the prosecution.

MR. HARDY: Yes, sir.

Ladies and gentlemen, we are now required or obligated to address you with respect to points that Mr. Bailey made during his argument and offer you an alternative view to certain things that he said to you and to us.

He said we were unfair. Said we didn't tell you about the—that Compton was selling crude oil to other locations. My recollection is that I told you that and in fact it came out during trial that Mr. Young was trying to raise the gravity level of the fuel oil that it was selling up at Cyril so it would be like the other crude oil that they were selling. And we concede and admit and know and say they were selling to the other locations, that is Tex-Mex and Mabee and [549] Blanken, places like that. I don't recall not telling you that, in fact, it was a theory of the government's case as I recollect that the alteration in the gravity level with the condensate was to make this fuel oil look like crude oil.

I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.

And then he says Apco wasn't defrauded. Well, a friend for 20 years, Hugh Bradley signed a contract with him, said I'll sell you personally, not just Compton, Bill G. Young right on there, I'll sell you Oklahoma Sweet crude. That's what he said he would sell them right there at Cyril. He told them he would do that and he thought it was such a good deal he wrote a letter back in April a couple of months later and he said, Dear Mr. Bradley, I want to amend this to make it go on every month.

And then the fellow Don Heavin that came in here this morning, I don't know what you thought of him, seemed like a very nice decent sort of guy, Mr. Young even told us he thought he was a nice guy, when Don Heavin, Hugh Bradley, they called him up, Mr. Young, and said, Bill, are you selling us [550] fuel oil instead of Oklahoma Sweet crude oil? He said no.

I don't know what you call that, I call it fraud.

You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud.

Mr. Bailey told us up until September Apco was entirely happy. Well, they were happy because they didn't know. That's the whole point of the prosecution, it was a fraud. They didn't know until they did the distillate and they told you that they didn't do the distillate on the samples catchers until the fuel oil racks started filling up with residual. You remember old Acel Ackley came in this morning and drew us the charts and showed us they like to get about 25, 30 percent residium and they were getting 50 percent and they were getting this huge production and they checked their pipe line supplier, checked their distillation process trying to figure out why this was happening then they finally took a sample catcher or they caught a truck from Pioneer Oil and found out they were bringing in straight fuel oil. And then they did a sample catcher test and they found out they were getting fuel oil, they weren't getting

crude oil. Well, Apco wasn't so happy then because the FBI got involved in the case. They weren't happy at all when they found out and that is the point of a fraud when they don't know they're happy.

He said—Mr. Bailey said Apco didn't lose, says [551] doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they're going to come back. All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. That's what I think.

Mr. Bill—Mr. Young, he didn't certify anything. Who certified it? People that he worked—that worked for him and you heard them testify. They were friends of Mr. Young. And what does that evidence show? That he got them involved in this. They could have all been charged but they weren't. He was charged because he was the one that asked them to do it. He was the one that said set up the tanks in Chickasha, he was that the one that got them to set up the tanks down in Abilene yard. He was the one that would have them send the invoices up to Apco. He was the one that did it not Judy Boeshart or Johnnie Huff or Lennox Bird or Grady Haynes or Ken Fuller, they're all nice fellows and women too, they came in and testified, they all got themselves in the middle of this case. I suppose some prosecution should say bring them all in. The grand jury decided to indict only the one that appears, that's alleged that was involved that perpetrated it, the manager, the executive vice president, the top man at Compton is Mr. Young. He was the one everyone said, every single one of those people he got involved in this say, they [552] did it because he told them to do it.

Well, Mr. Bailey said that Mr. Young acted with honor and integrity in this case, he was the only one that did it. Well, he got all of his friends at Compton involved in this thing and he told his friends at Apco, Hugh Bradley, Don Heavin, said, no, I'm not selling you fuel oil. I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as ju-

rors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.

As I say, ladies and gentlemen, we are required only to mention alternative ways of looking at points that Mr. Bailey made in his closing argument and that's what I've tried to do.

I ask you to go back in the jury room and I endorse Mr. Bailey's suggestion that you use your common sense in the case and if you do I think you are required to come back and find out, yes, it's in truth and fact without fear and favor of bias and prejudice and sympathy, this happened, it's a crime, Mr. Young did it.

Thank you.

THE COURT: Thank you.

Supreme Court of the United States

No. 83-469

UNITED STATES, PETITIONER

v.

BILLY G. YOUNG

ORDER ALLOWING CERTIORARI. Filed February 21, 1984.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

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MAY 21 1984
ALEXANDER L. STEVAS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a prosecutor may rebut closing defense argument impugning the integrity of the prosecution and asserting that the prosecutors themselves do not believe in the defendant's guilt by responsive argument that would be inappropriate in the absence of such provocation.

2. Whether the court of appeals erred in reversing on the basis of the prosecutor's remarks when respondent did not object to the remarks at trial.

3. Whether, assuming the prosecutor's remarks were improper, the court of appeals erred in failing to determine whether they constituted harmless error.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-469

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing was denied on June 20, 1983 (Pet. App. 12a). Justice White extended the time within which to file a petition for a writ of certiorari to and including September 18, 1983 (a Sunday). The petition was filed on September 19, 1983, and was granted on February 21, 1984 (J.A. 12). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, respondent was convicted on nine counts of mail fraud, in

violation of 18 U.S.C. 1341, and three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001.[1] He was sentenced to two years' imprisonment on each count, to be served concurrently, and was fined $39,000. The court of appeals reversed (Pet. App. 1a-11a).

1. The evidence at trial showed that respondent, vice president and general manager of Compton Petroleum Corporation (Compton) in Abilene, Texas, contracted in 1976 and 1977 to deliver monthly supplies of Oklahoma "sweet" crude oil[2] to the Apco Oil Corporation (Apco) refinery at Cyril, Oklahoma. Some 205,000 barrels of oil were delivered between January and September 1977, but approximately 117,250 barrels consisted of fuel oil, an already refined product different from and less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all the oil was crude oil. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, the amount of crude oil it thought it was refining each month. The FEA in turn relied on Apco's reports to determine the national averages of tier categories of refined oil

[1] Prior to trial, the government dismissed one other mail fraud count, and at the close of the evidence, the district court granted a judgment of acquittal on a second mail fraud count. The jury acquitted respondent on one count of interstate transportation of stolen property (18 U.S.C. 2314). Compton Petroleum Corporation was also indicted with respondent. Prior to trial, the district court accepted the corporation's nolo contendere plea to the indictment and imposed a fine (Pet. App. 3a).

[2] Crude oil is a liquid hydrocarbon in its natural state. "Sweet" crude oil has a low sulfur content.

for purposes of equalizing the cost of crude oil under its entitlements program. Pet. App. 2a.

In December 1976, respondent agreed with Hugh Bradley, Apco's vice president of supply and transportation, to increase the amount of crude oil that Compton was delivering to Apco's Cyril refinery. Shortly afterward, respondent and Bradley signed a contract formalizing that agreement; they later amended the agreement to make it automatically renewable each month. Tr. 351-354, 510-512; GX 47, 48.

Although respondent caused certain amounts of crude oil to be delivered to Apco in compliance with the contract, he used other means of supply for the remainder of the oil deliveries. In the same period that respondent spoke with Bradley, respondent suggested an arrangement with Kenneth Ross, a longtime friend and business associate (Tr. 339-340).[3] Ross owned Prime Resources Corporation, an oil brokerage firm (Tr. 318-320). Under respondent's plan, Ross was to secure fuel oil and falsely certify that it was crude oil; in turn, respondent would have Compton pay Ross a 10¢ per barrel commission as a fee for the recertification (Tr. 261, 320-323). Ross fulfilled his agreement; he began to buy fuel oil from Producer's Crude, Inc., an Abilene, Texas oil reseller. The invoices from Producer's Crude to Prime Resources accurately stated that the purchases were of fuel oil (GX 24-26, 28), but Prime Resources' invoices to Compton for the same substance certified that they

[3] Ross testified to the transactions at trial, having pleaded guilty to a charge of conspiracy in connection with his role in the scheme (Tr. 325-326).

were of crude oil (GX 8). See Tr. 180, 253-258, 272, 306-311, 320-322, 421-423.[4]

The fuel oil was delivered from the refinery to two holding tanks in Compton's yard in Abilene (Tr. 49-50, 84-90, 97-98, 125-126, 137-138, 156). To make it appear that the tanks contained crude oil, Compton's truck dispatcher painted a crude oil lease number on the tanks (Tr. 100-101, 110, 140-141). Several Compton truck drivers then reloaded the fuel oil into Compton trucks and delivered it to the Apco refinery in Cyril (Tr. 96, 107-111, 120-121, 124, 135-137, 153-155, 160, 165-166; GX 6D-6I). Though Compton's drivers normally performed two simple tests on crude oil obtained from a lease site, they were told that it was not necessary to perform any tests on the oil taken from the tanks in Compton's yard (Tr. 52-53, 105-106, 129, 144, 155-156).[5]

At Apco's Cyril refinery, the Compton drivers emptied their fuel oil into a lease automatic custody transfer (LACT) unit. The LACT unit, which

[4] Producer's Crude bought the fuel oil from another Abilene concern, Pride Refinery (Tr. 49, 421-423; GX 34, 35, 40). Respondent's nephew, Mike Rawlings, who worked for Producer's Crude (Tr. 48, 85), transported the fuel oil from the refinery to Compton's yard in Abilene, approximately seven miles away. Rawlings made between two and six deliveries per day, hauling 20,000-25,000 barrels of fuel oil each month from March through September 1977 (Tr. 84-90). Before Rawlings' tenure, some loads of fuel oil were moved by Compton drivers directly from the Pride refinery to Apco at Cyril (Tr. 131, 163-164, 166-167).

[5] Those tests are known in the trade as "shakeouts." A small quantity of crude oil is placed in a device which measures its relative weight in degrees. This is referred to as the "gravity" of the oil. In addition, the crude oil's basic sediment and water (BS&W) content is measured (Tr. 52-53, 105, 129).

was not manned, automatically measured the number of barrels in each delivery. It also collected a small sample of each barrel for later testing. Such testing would reveal, inter alia, the relative weight—known as "gravity"—of the oil. Tr. 47-48, 375-377. A high gravity crude oil, in the 35° to 40° gravity range, yields greater quantities of gasoline and diesel fuel after refining than does a lower gravity crude oil, which yields more fuel oil and asphalt (Tr. 400-406, 414).[6] Apco wanted a high gravity crude for gasoline production (Tr. 357, 400-403).

Because fuel oil has a low gravity, respondent made arrangements to conceal what he was supplying. He had Compton's crude oil trader purchase from two other companies quantities of condensate, a high gravity liquid taken from the wellheads of natural gas wells. The condensate was delivered to a Compton storage station at Chickasha, Oklahoma. Tr. 51, 53-54, 64-66, 80, 179, 479; GX 1A-1B, 2A-2J. Compton drivers later moved the condensate to the LACT unit at Apco's Cyril refinery (Tr. 123-125, 130, 155). Since the condensate's gravity was 60° or higher, blending it with the fuel oil resulted in an increase in the gravity measurement of the oil stream (Tr. 52, 56, 76).

Respondent's scheme was common knowledge among the Compton truck drivers who delivered fuel oil to Apco (Tr. 121, 157-158). Other Compton employees were not as knowledgeable. When Kenneth Fuller, Compton's operations manager and respondent's second in command, discovered that fuel oil was being delivered to Apco, he confronted respondent, who replied that there "wasn't any problem" with

[6] Fuel oil comes from the "bottom of the barrel" and is not a profitable product for a refinery (Tr. 422, 424).

such deliveries (Tr. 72-73, 75-77). And in April 1977, Homer Reves, Compton's chief accountant, told another employee that something was not right about the Apco transaction, because Compton was buying oil from Prime Resources yet was paying a second company for most of the oil (Tr. 201-202). On one occasion, L. K. Bird, another Compton accountant, received an invoice. Bird showed the invoice to Reves, who said that fuel oil was being delivered to Apco contrary to the terms of Compton's contract with Apco. Reves also said that he believed that Prime Resources was being paid a fee for changing the certification concerning the oil. Tr. 251, 261-262. Reves returned the fuel oil invoice to Prime, and he later received in its place an invoice for crude oil (Tr. 268-269).[7] In addition, Judy Boeshart, a Compton production supervisor, heard respondent tell another Compton employee that fuel oil would be invoiced through Ken Ross, who would change the certifications to reflect crude oil instead. Ross's fee for this service was to be 10¢ per barrel. Tr. 273-274.

Despite the growing numbers of persons at Compton who were aware of respondent's scheme, Apco was slow to discover it. Not until September 1977, as the result of an investigation prompted by another company's delivery of fuel oil, did Apco determine that respondent also was furnishing fuel oil. Later in September, a sample was taken from the LACT unit used by Compton, and an Apco laboratory technician

[7] After the instant investigation began, Kenneth Ross and his wife Jerit, who had prepared the invoices containing false certifications that crude oil was sold, substituted in Prime Resources' file new invoices that correctly stated that fuel oil had been sold (Tr. 306-307, 320-322).

performed a distillation test on that sample.[8] The technician's conclusion was that the oil provided by respondent was 50% residual fuel oil. Tr. 354-356, 368-369, 378-379, 403-405; GX 36A, 36B. On learning of the test results, Don Heavin, Apco's pipeline superintendent and a friend of respondent, called respondent and asked whether he was delivering virgin crude oil. Respondent said that he was (Tr. 379, 496, 516).[9] Heavin reported the test results to Hugh Bradley, and afterwards the Compton deliveries decreased (Tr. 354-355, 370, 378-381).[10] Because of respondent's delivery of a fuel oil/condensate mixture, Apco needlessly spent time and money duplicating the refinement of already refined fuel oil (Tr. 372). In addition, the refining process produced too much fuel oil for Apco's needs and an insufficient amount of gasoline (Tr. 357, 378, 403). An Apco chemist testified that condensate had little value in the refining process and that very little of it is usable at all (Tr. 416-417).

[8] A distillation test is more complicated than the simple gravity and BS&W tests that normally were performed (Tr. 368, 376).

[9] Earlier, when the other company's fuel oil delivery was discovered, Hugh Bradley of Apco called respondent and asked if respondent likewise was delivering fuel oil. Respondent assured Bradley that he knew nothing about deliveries of fuel oil (Tr. 357-358).

[10] In March 1979, two FBI agents interviewed respondent as part of an investigation into allegations that various companies had sold fuel oil to Apco in 1977 and had falsely certified that it was crude oil (Tr. 293). Respondent told the agents that Compton had sold oil to Apco in 1977, but he maintained that Compton sold virgin crude oil, not fuel oil certified as crude. Respondent also told the agents that if he had discovered that Compton was selling fuel oil, he would immediately have terminated the deal. Tr. 294.

Throughout this period, Apco filed monthly reports with the Federal Energy Administration concerning the amounts of crude oil that Apco thought it was refining (Tr. 431, 434-435; GX 49). Using those reports and similar ones filed by other crude oil refiners, the FEA determined the average monthly price of crude oil per category. Those refiners who had access to cheaper oil had to purchase entitlements, *i.e.*, pay into a fund, while those who paid more than the national average received rebates from this fund. The purpose of the entitlements program was to equalize the cost of crude oil among all refiners nationwide (Tr. 371, 432-433). Refiners were not supposed to report fuel oil that they received, and they were not entitled to any compensation for purchases of fuel oil (Tr. 433-434, 439-440). The Apco official in charge of regulatory compliance testified that the company would have to return the entitlements payments it received in connection with the fuel oil deliveries (Tr. 440).

2. In his own defense, respondent admitted that he had knowingly purchased fuel oil from Prime Resources, but he claimed that he thought that such fuel oil could legitimately be certified as crude oil (Tr. 476-477, 526-527). He based that contention on his knowledge that crude oil had been sold in the past as fuel oil, from which he concluded that the reverse could be true (Tr. 477). In addition, he said that he believed that if condensate were blended with fuel oil, the result would be the equivalent of a barrel of crude oil (Tr. 478, 520-521).[11] Because he had received no

[11] To the FBI agents, however, respondent had acknowledged that crude oil was more valuable than fuel oil, which is a less valuable component of the refinement process (Tr. 294). Moreover, respondent admitted at trial that he had not wanted to tell Heavin that the product he was providing to Apco was fuel oil rather than virgin crude, because Heavin "was a friend of mine and that would have been kind of hard to explain to him what it was" (Tr. 496).

complaint from Apco prior to September 1977, he said that he believed that Apco was pleased with the stream of oil he was supplying (Tr. 495). Respondent admitted that he had lied to Heavin, Bradley, and the FBI agents by saying that he had not sold fuel oil to Apco (Tr. 487, 496-497, 516), but he maintained that the composite stream of oil he had provided to Apco was actually better than what Apco otherwise was receiving (Tr. 494).

3. In closing argument, the prosecutor summarized the evidence against respondent. Respondent's attorney began his own summation by arguing that the case against respondent had been presented unfairly by the prosecution, and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison your [the jurors'] minds unfairly" (J.A. 4). He went on to charge the prosecution with "reprehensible" conduct in purportedly attempting to cast a false light on respondent's actions (J.A. 5). Defense counsel also pointed to the prosecution table and said, "I submit to you that there's not a person in this courtroom including those sitting at this table who think that [respondent] intended to defraud Apco" (J.A. 5). Finally, near the conclusion of his argument, respondent's attorney said that respondent had been the only person in the case who had acted "with honor and with integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (J.A. 7).

In rebuttal, the prosecutor responded to defense counsel's claim that the government did not believe in its own case by saying (J.A. 8-9): [12]

> I think [defense counsel] said that not anyone sitting at this table thinks that [respondent] intended to defraud Apco. Well, I was sitting here and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.

After reviewing some of the evidence against respondent, the prosecutor then said, "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud" (J.A. 9).

Government counsel also responded to defense counsel's claim that Apco had not suffered any loss in the FEA's entitlement program; the prosecutor said that, based on his experience in these matters, Apco would have to make some kind of restitution (J.A. 10). Finally, the prosecutor addressed defense counsel's claim that respondent had acted with honor and integrity and that the jury should not convict on the basis of complex energy certification regulations. The prosecutor briefly reviewed some of respondent's conduct, and suggested that such conduct did not constitute honor and integrity and that the jury would not be doing its duty by ignoring the court's instructions and acquitting on such a concept (J.A. 10-11).

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[12] The prosecutor first answered defense counsel's charge that the prosecution had failed to inform the jury that Compton was selling crude oil to other locations (J.A. 8). Respondent apparently does not object to that response.

Respondent did not object to any of these statements.

4. Despite respondent's failure to object at trial, the court of appeals held that the prosecutor's statements constituted misconduct and warranted reversal (Pet. App. 10a). The court rejected the government's argument, based on the Court's decision in *Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958), that the prosecutor's statements were invited by defense counsel's own arguments. The court said instead that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). Judge McWilliams dissented without opinion (*ibid.*).

The court also denied the government's petition for rehearing by the same vote (Pet. App. 12a-13a). In that petition, the government argued that the court of appeals panel had erred in not considering whether the prosecutor's statements were harmless in light of the record as a whole, particularly since there was overwhelming proof of respondent's guilt. In connection with that argument, the government called the court of appeals' attention to this Court's then-pending consideration of a similar issue in *United States* v. *Hasting*, No. 81-1463 (May 23, 1983). In addition, the government argued that the court of appeals had erred in finding the prosecutor's arguments to be "plain error" when defense counsel's failure to object had deprived the district court of an opportunity to remedy any purported error. Finally, the petition noted that the decision below appeared to be inconsistent with this Court's decision in *Lawn* and with decisions by other courts of appeals on the "invited response" doctrine. The court denied rehearing without opinion (Pet. App. 12a-13a).

SUMMARY OF ARGUMENT

Respondent's convictions for mail fraud and making false statements to a government agency were reversed by a divided panel of the court of appeals on a finding that certain comments made by the prosecutor during rebuttal argument, though not objected to at trial, were plain error. The comments were in direct response to improper remarks by defense counsel placing the good faith of the prosecution in issue. The court held that the prosecution has no right of reply to improper defense remarks. The court made no finding that the remarks affected respondent's substantial rights or otherwise prejudiced him, and it did not address the government's argument that the comments, if error at all, were harmless.

The court of appeals thus committed three separate but interrelated errors, with significant implications for the administration of criminal justice in the federal courts. First, the court refused to view the challenged comments of the prosecutor in light of the defense comments that provoked them. Second, the court disregarded the contemporaneous objection rule, finding "plain error" solely on the basis that the court's prior precedents had spoken clearly to the issue, without analysis of prejudice, if any, to respondent's substantial rights. Third, the court reversed the conviction without considering whether the error was harmless.

The court's holding that the prosecution has no right to respond to improper defense statements in summation is contrary to precedent and overlooks the adversarial dynamics of trial. If the defense raises an issue, such as the prosecutor's personal sincerity or integrity, it is only fair that the prosecution be able to rebut it. The court of appeals' approach would permit the defendant to goad the prosecutor

into a response, and then benefit by procuring a reversal.

The court's approach would also result in application of the rule against "vouching" in a context where it does not apply. The usual dangers that can make a prosecutor's statements of personal belief prejudicial to the accused were almost surely absent here. A prosecutor's statements of personal belief ordinarily imply knowledge of evidence outside the record and may give the impression that the prestige of the government is brought to bear against the accused. Where the statements are in direct response to defense counsel's accusations concerning the prosecutor's personal beliefs, however, the jury will ordinarily understand the prosecutor's response as just that—a response—and will not accord the remarks undue significance or weight. The import of comments made in closing arguments must be evaluated in context, as the jury heard them, and not on the abstract basis of a per se rule.

The court of appeals aggravated its one-sided approach to evaluating closing argument by its disregard for the contemporaneous objection rule and its failure to consider harmless error. Each of these principles can be understood as a protection of the integrity of the trial process. Each guards against a hypersensitive scrutiny of trial practice by appellate courts. Broad discretion is rightly vested in district courts to ensure fairness and maintain decorum; and concomitant reliance is placed on trial counsel to identify errors when made so that they can be rectified. No doubt appellate counsel and appellate judges can often spot deficiencies that went unnoticed at trial. The limiting principles of appellate review, however, are predicated on the understanding that

deficiencies not noticed at the time are unlikely to have caused serious prejudice to the defendant and that the costs to the system of applying keen hindsight to a criminal trial are, except in egregious circumstances, too high.

Here, neither the trial court nor defense counsel saw anything amiss in the prosecutor's rebuttal. This can doubtless be attributed to the fact that they had also heard the provocation. Yet, on the basis of a per se rule, without any finding of actual prejudice to respondent, the court of appeals reversed the conviction. The court then failed to consider the harmlessness of the error—thus underscoring its indifference to actual prejudice. The result of the decision is to require retrial of a defendant whose guilt is indisputable on the record, on the basis of a putative error that carried with it little potential for prejudicing respondent's right to a fair trial and an accurate verdict.

The decision below thus stands in direct conflict with decisions of this Court concerning a prosecutor's right to reply to improper arguments by the defense (*Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958)), the defendant's obligation to object to improper remarks by the prosecutor at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)), and the appellate court's duty to consider whether any trial error is harmless (*United States* v. *Hasting*, No. 81-1463 (May 23, 1983)). It should be reversed.

ARGUMENT

I. A PROSECUTOR'S COMMENTS IN REBUTTAL ARGUMENT ARE NOT IMPROPER IF THEY WERE INVITED BY IMPROPER COMMENTS MADE BY DEFENSE COUNSEL

In the adversary process of a criminal trial, the government has a special obligation to "refrain from improper methods calculated to produce a wrongful conviction." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). The attorney for the government "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Ibid.* Nor are foul blows and improper methods within the legitimate arsenal of the defense. At issue in this case is the propriety of corrective steps taken by the government when defense counsel has overstepped the bounds of proper argument.

The prosecutor in rebuttal argument at trial stated his personal belief that respondent was guilty of fraud. Such a statement, examined in isolation, would be prosecutorial error. For weighty reasons discussed below (see pages 24-25, *infra*), such statements, if prejudicial and if preserved for appellate review by timely objection, can necessitate reversal of a conviction. But—contrary to the decision below—such statements must not be viewed in isolation. Where the defense itself has raised the issue of the prosecutor's personal beliefs regarding the case, the prosecutor's response, if proportionate to the provocation, is permissible. The court of appeals' per se rule against prosecutorial response to improper defense argument disregards the realities of trial and conflicts with numerous decisions of this and other courts.

A. Recognition Of A Prosecutor's Right To Respond To Provoking Comments By Defense Counsel Is Consistent With Trial Fairness And Well Established Precedent

Closing arguments "are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647 (1974). A closing argument requires quick thinking—and often quick response to comments by opposing counsel. Perhaps because of the difficulties experienced in closing arguments, it has long been recognized that a prosecutor has the right to comment on and respond to an opposing counsel's argument, and in a vigorous manner, not one "confined to such detached exposition as would be appropriate in a lecture." *United States* v. *Wexler*, 79 F.2d 526, 530 (2d Cir. 1935), cert. denied, 297 U.S. 703 (1936); *Malone* v. *United States*, 94 F.2d 281, 288 (7th Cir.), cert. denied, 304 U.S. 562 (1938). In *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958), this Court held that the prosecution may respond in rebuttal to improper arguments by defense counsel, even though such response might not be permissible in the absence of provocation. In *Lawn*, as in the instant case, a defense attorney attacked the government's good faith in bringing the prosecution, and also accused two key government witnesses of being perjurers. This Court held that defense counsel's argument "clearly invited the [prosecutor's] reply," in which he vouched for the credibility of the challenged witnesses (*ibid.*).[13]

[13] Earlier, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), the Court had also recognized that a prosecutor could legitimately state his belief in the defendant's guilt as a rebuttal to defense arguments that placed the government's views in issue. In that case, the Court found that the particular comments "overstep[ped] the bounds" of such a reply, but it nonetheless found that the prosecutor's comments did not warrant reversal (*ibid.*).

Most courts of appeals have followed the *Lawn* doctrine of "invited response" and have refused to reverse convictions where prosecutors responded in closing argument to attacks made by defense counsel.[14] The court below, however, refused to apply the holding of *Lawn*, despite explicitly recognizing that the prior accusations by defense counsel constituted "improper conduct" (Pet. App. 11a). Instead, it followed an independent line of Tenth Circuit authority, developed without reference to *Lawn*, that holds that "even if improper argument is made by defense coun-

[14] *E.g.*, *United States* v. *Maccini*, 721 F.2d 840, 846-847 (1st Cir. 1983); *United States* v. *Harrison*, 716 F.2d 1050, 1053 (4th Cir. 1983), cert. denied, No. 83-1326 (May 14, 1984); *United States* v. *Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); *United States* v. *West*, 670 F.2d 675, 688-689 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981); *United States* v. *Schwartz*, 655 F.2d 140, 142 (8th Cir. 1981); *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Kim*, 595 F.2d 755, 767-768 (D.C. Cir. 1979); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Sullivan*, 421 F.2d 676, 677 (5th Cir. 1970) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966). See also 1 ABA Standards for Criminal Justice ¶ 3-5.8, commentary at 3-91 (2d ed. 1980) ("[A] prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation."). But see *United States* v. *Robinson*, 716 F.2d 1095 (6th Cir. 1983), petition for cert. pending, No. 83-613.

sel, the door is not thereby opened to similar conduct by the prosecution." See *United States* v. *Rios*, 611 F.2d 1335, 1343 (1979); *United States* v. *Latimer*, 511 F.2d 498, 503 (1975); *United States* v. *Ludwig*, 508 F.2d 140, 143 (1974).[15] Moreover, the court of appeals emphasized that the Tenth Circuit's rule operates per se; the court will examine only the conduct of the prosecutor, without reference to any statements by the defense that might have prompted it. The court stated that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). The Tenth Circuit's per se rule, applied by the court below, is in direct conflict with the "invited response" doctrine of *Lawn* and its progeny.

The comments by the prosecutor that are now complained of by respondent were unquestionably pro-

[15] The Tenth Circuit's current position evolved indirectly, through dictum, without citation to *Lawn* or to decisions of any other circuit. The rule was first announced in *Ludwig* (508 F.2d at 143). However, the government in *Ludwig* did not argue that the prosecutor's comments at issue were a permissible response to defense comments, but conceded they were in error. The government's argument—rejected by the court—was that the error was harmless "in view of numerous complaints directed against defense counsel's own conduct" (*ibid.*). In *Latimer*, the court faced the issue of improper response to a *proper* argument by the defense (see 511 F.2d at 503), quoting the *Ludwig* rule in dictum. Finally, in *Rios*, the court concluded that the record did not support the government's claim that the prosecutor's comment was in response to the defense (611 F.2d at 1343). Thus, the court's statement of the general rule against a prosecutor's right to reply (*ibid.*) was again dictum. The instant case is apparently the first in which the rule has been employed in clear contravention of *Lawn*.

voked by defense counsel, who attacked the integrity of the prosecution and gratuitously raised the issue of the prosecutor's personal beliefs. In his summation, respondent's attorney argued that the government had presented the case unfairly and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison your [the jury's] minds unfairly" (J.A. 4). He also charged the prosecution with "reprehensible" conduct in purportedly attempting to cast respondent's activities in a false light (J.A. 5). He then pointed to the prosecution table and claimed that "there's not a person in this courtroom, including those sitting at this table [the prosecutors and the case agent] who think that Billy Young intended to defraud Apco" (*ibid.*). Having placed the prosecutors' good faith in issue, respondent thus opened the door for the prosecutor's direct response (J.A. 8-9):

> I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
>
> * * * * *
>
> I don't know what you call that, I call it fraud.
>
> You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud.

The provocation here was quite similar to that involved in *Lawn*, where defense counsel stated "that the United States Attorney and his assistant in

charge of the case 'had been instructed, or in my opinion they never would have done this'" (355 U.S. at 359-360 n.15). Accordingly, under these circumstances, "the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion" (*United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973)), including "statements * * * which otherwise would be improper" (*United States* v. *Doyle*, 234 F.2d 788, 796 (7th Cir.), cert. denied, 352 U.S. 893 (1956), quoting *Malone*, 94 F.2d at 288).

In similar circumstances, other courts have held that a defendant should not profit from his own attorney's inducement of retaliatory arguments by a prosecutor. For example, in *Del Cristo* v. *United States*, 327 F.2d 208 (5th Cir. 1964), defense counsel argued that the prosecutor did not really believe that the defendant was guilty but had chosen to prosecute the defendant because two more culpable individuals had mistakenly been released. The court of appeals held that that argument "provoked" the following retort from the prosecutor (*id.* at 209):

> I want you to realize the fact that if this man is guilty and you let him go, he will go out and sell [narcotics] again and again. * * *
>
> My final word, ladies and gentlemen, is my sincere belief—and again I must say that defendant's counsel led you to believe that I don't believe this story, that I am here because I have a job to do—but I believe this man is guilty of the crime charged, or I would not be standing here right now prosecuting him. We do have a dirty duty as prosecutors. * * *

To the same effect is *United States* v. *West*, 670 F.2d 675, 689 (7th Cir.), cert. denied, 457 U.S. 1124 (1982), where defense counsel placed at issue the

integrity of the United States Attorney's Office, and the prosecutor responded, "I will stand up for everyone in the government, that's who I represent," and urged the jury to quickly return a not guilty verdict if it did not approve of the way the government had investigated and brought the prosecution. The court of appeals found nothing improper in this argument, for defense counsel had raised the issue, thus inviting the government's response, which the court held to be "within the bounds of proper argument" (*ibid.*). Accord, *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980) (defense counsel's "vitriolic" attacks on the integrity of the prosecution team and government's witnesses justified prosecutor's responses); *United States* v. *Hoffa*, 349 F.2d 20, 51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966) (proper for prosecutor to state his belief in defendant's guilt where prosecutor's integrity had been questioned); *United States* v. *Battiato*, 204 F.2d 717, 719 (7th Cir.), cert. denied, 346 U.S. 871 (1953) (prosecutor's statement of belief in defendant's guilt justified by defense counsel's quotation of motto from the Department of Justice building that the "Government wins when justice is done"); see also *United States* v. *Harrison*, 716 F.2d 1050, 1052-1053 (4th Cir. 1983), cert. denied, No. 83-1326 (May 14, 1984) (prosecutor's expression of hatred for defendants provoked by defense counsel's summation).

We do not suggest, of course, that *any* improper argument by the defense automatically opens the door to *any* retort by the government. The propriety of the prosecution's response must be examined in light of: (1) the logical relation between the challenged arguments and the defense statements that

provoked them;[16] and (2) the appropriateness of the response in light of the nature of the defense statements.[17] The measure of the response is the provocation.

Here, the prosecutor's affirmation of his "personal impression[]" that respondent intended to commit a fraud (J.A. 8-9) was related to defense counsel's baseless accusation that "there's not a person in this courtroom"—specifically gesturing at the prosecutors —"who think that Billy Young intended to defraud Apco" (J.A. 5). Indeed, the prosecutor introduced his statement by summarizing defense counsel's charge ("I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco" (J.A. 8)) and informed the jury that the reason he was giving his "personal impressions" was

[16] For example, in *United States* v. *West*, 680 F.2d 652, 655-656 (9th Cir. 1982), the court recognized the "invited response" doctrine but found that the government's comments were not logically connected to the defense comments that supposedly invited them. By contrast, in *LaSorsa*, 480 F.2d at 526, the court found that "[t]he defense had, indeed, insinuated precisely the type of prosecutorial misconduct which the prosecutor was attempting to refute in his argument to the jury."

[17] For example, in *Socony-Vacuum*, 310 U.S. at 242, this Court determined that the "subject matter" of the prosecutor's remarks was "certainly relevant" to the defendants' argument to the jury, but found that the remarks nonetheless "overstep[ped] the bounds." Courts have recognized that "even egregious remarks will not necessarily require reversal of a conviction" where the prosecutor's remarks "were invited by the equally egregious conduct of * * * defense counsel" (*United States* v. *Harrison*, 716 F.2d at 1051), yet the persistence and emphasis of the prosecutor's statements are significant factors in determining whether there was reversible error. *Ibid.*; see also *United States* v. *Elmore*, 423 F.2d 775, 781 (4th Cir.), cert. denied, 400 U.S. 825 (1970).

that "it was asked of me" (J.A. 9). Nor were the prosecutor's remarks disproportionate to the provocation. In light of defense counsel's repeated attacks on the integrity of the prosecution, the relatively mild corrective statements by the prosecutor were clearly "rebutting language suitable to the occasion." *United States* v. *LaSorsa*, 480 F.2d at 526.[18] As the Second Circuit observed in somewhat similar circumstances, "in light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements * * * were understandable if not laudable." *United States* v. *Perry*, 643 F.2d 38, 51 (2d Cir.), cert. denied, 454 U.S. 835 (1981).

The other comments faulted by the court of appeals stand on the same footing. The prosecutor's comment that respondent had not acted with "honor and integrity" and his reminder to the jury that they had a duty to follow the court's instructions (J.A. 10-11) were in response to defense counsel's argument that respondent had been "the only one in this whole affair that has acted with honor and with integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (J.A. 7). Cf. *United States* v. *West*, 670 F.2d at 689; *United States* v. *Isaacs*, 493 F.2d 1124, 1165 (7th Cir.), cert. denied, 417 U.S. 976

[18] We do not believe that the alternative proposed by the court of appeals (Pet. App. 11a)—objecting to an improper defense argument and requesting an instruction to the jury to disregard that argument—is sufficient to dispel the unfairness engendered by an argument like respondent's here. Such an instruction would not answer the factual assertion of prosecutorial hypocrisy that was made here. It is not surprising that the court and attorneys involved apparently viewed a direct answer by the prosecutor as the appropriate response.

(1974); *United States* v. *LaSorsa*, 480 F.2d at 526. And the prosecutor's statement that, according to his experience, Apco might well have to make restitution under the entitlements program was supported by direct testimony by an Apco official to that effect (see Tr. 440).

In short, the court below was clearly in error in refusing to analyze the propriety of the prosecutor's rebuttal argument in light of the context in which it arose—the provocations of defense counsel's summation. *United States* v. *Maccini*, 721 F.2d 840, 846-847 (1st Cir. 1983); *United States* v. *West*, 670 F.2d at 688-689; *United States* v. *Isaacs*, 493 F.2d at 1165.

B. The Court of Appeals' Per Se Rule Exceeds The Protections Necessary To Avoid Prejudicial "Vouching" By The Prosecution

Expression of personal opinion by the prosecutor concerning the guilt of the accused or the credibility of witnesses—commonly called "vouching"—is widely recognized as improper, and can in some circumstances so prejudice the rights of the defendant as to necessitate reversal of a conviction. See, *e.g.*, *Berger*, 295 U.S. at 88; *Mason* v. *United States*, 719 F.2d 1485, 1489 (10th Cir. 1983); *United States* v. *Roberts*, 618 F.2d 530, 533-534 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981); 1 ABA Standards for Criminal Justice ¶ 3-5.8, commentary at 3-87 (2d ed. 1980).

There are two principal ways in which vouching can prejudice a defendant. First, and most serious, a prosecutor's comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant. See *Lawn*, 355 U.S. at 359-360 n.15; *Roberts*, 618 F.2d at 533; *United States* v. *Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972); ABA Standards, *supra*, commentary at 3-89 ("Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony."). They can thus jeopardize the defendant's right to confront his accusers and to be tried solely on the basis of evidence properly placed before the jury. Second, the prosecutor's opinion may "place the prestige of the government" (*Roberts*, 618 F.2d at 533) behind a witness or a conclusion, thus tending "to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued" (ABA Standards, *supra*, commentary at 3-88). It may induce the jury to trust the government's judgment rather than its own view of the evidence.

The court of appeals' disregard for the context of the prosecutor's remark in the trial below—its genesis in the prior improper statements of defense counsel—resulted in reversal of conviction where neither of these concerns was implicated.

The prosecutor's statement of his "personal impression[]" that respondent intended to commit a fraud contained no suggestion whatsoever that it had a basis outside the evidence at trial. The prosecutor specifically supported his opinion by reference to the evidence—that respondent received "85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of" (J.A. 8-9). He then reiterated to the jury, "You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud" (J.A. 9). Perhaps most to the point, the jury, having heard the comments in context, must surely have understood them for what they were: a defense of the prosecutor's own integrity in bringing charges on the basis of the evidence that the jury had heard. There is no reason to suppose that the jurors would accord the remarks the more sinister construction that the prosecutor was communicating information outside the record.

Nor did the prosecutor seek to exploit the prestige of the government to sway the jurors. Quite the opposite: he was attempting to restore the jury's faith in the fairness of the prosecution, which had been groundlessly impugned by defense counsel's effort to sway the jury against the government. The correction of the false impression created by defense counsel did not induce the jury to disregard the evidence, but instead properly tended to refocus its attention on the evidence instead of on the irrelevant and unsupported accusations by defense counsel.

In circumstances such as these, the invited response doctrine is an appropriate complement to the rule against prosecutorial vouching. By requiring the appellate court to examine the challenged prosecutorial statements in light of defense provocation, the doctrine obviates reversals of convictions where the underlying rationale of the rule against vouching does not apply.

Moreover, the invited response doctrine inhibits abuse by defense counsel of the limits on proper closing argument. To focus on the prosecutor's argument in isolation is to grant a windfall to defendants who invite error, thus encouraging misconduct by defense counsel. Defense attorneys should not be free to goad their opponent into making a response, and then obtain appellate reversal of their client's conviction by insisting that the prosecutor's comment be viewed outside the context in which it arose.

II. BECAUSE RESPONDENT FAILED TO LODGE A TIMELY OBJECTION AT TRIAL TO THE PROSECUTOR'S ARGUMENT, THE COURT OF APPEALS SHOULD NOT HAVE CONSIDERED THE ISSUE ON APPEAL

Even assuming arguendo that the court of appeals correctly condemned the prosecutor's rebuttal argument, the court was still wrong in finding that his

comments, which were not objected to at trial, were proper grounds for reversal on appeal. This Court has held that "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the [prosecutor's] comments to the jury were improper and prejudicial." *Socony-Vacuum*, 310 U.S. at 238-239; see *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). This contemporaneous objection rule requires a defendant to state an objection clearly at trial in order to preserve that objection on appeal. The rule applies to objections to, inter alia, admission of evidence, jury instructions, and statements in closing argument. See *United States* v. *Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

While there does exist a "plain error" exception to the contemporaneous objection rule—reflected in Fed. R. Crim. P. 52(b)[19]—it must be "used sparingly" (*United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)), lest it swallow up the requirement of timely objections at trial. Accordingly, this Court has held that where, as here, a defendant has failed to object to the prosecutor's statements to the jury when they were made, an appellate court may not reverse on the basis of an erroneous statement contained in that argument unless the impropriety is "obvious" or would "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *Socony-Vacuum*, 310 U.S. at 239, quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). In *Frady*, 456 U.S. at 163 & n.13, this Court stated that

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[19] Fed. R. Crim. P. 52(b) provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

the plain error exception is confined to "egregious errors," and is to be used "solely in those circumstances in which a miscarriage of justice would otherwise result." This exacting definition of plain error has generally been observed by the courts of appeals. *Id.* at 163 n.14.[20]

The contemporaneous objection rule serves obvious and salutary purposes. Timely objection affords both the trial court and the prosecutor the opportunity to consider, and perhaps rectify, their decisions and trial tactics while it is still possible to do so. If a defendant prevails on his objections, he may avert prejudicial error and thus enhance his chances to secure an acquittal from the jury. And if he nonetheless is convicted, his timely objections will have defined and delimited the points to be reviewed on appeal, and will have obviated the need to reverse a conviction simply because an error that was susceptible of correction was not perceived at trial. See *United States* v. *Somers*, 496 F.2d 723, 742 (3d Cir.), cert. denied, 419 U.S. 832 (1974). Even if the objection is made and overruled, the fact that the objection was raised will serve the additional function of facilitating review on appeal, for a trial court then has the chance to make a record on the claim while the recollection of the parties (and, if necessary, any

[20] See, *e.g.*, *United States* v. *Granville*, 716 F.2d 819 (11th Cir. 1983); *United States* v. *Carter*, 720 F.2d 941, 950-951 (7th Cir. 1983); *United States* v. *Kennedy*, 714 F.2d 968, 976-977 (9th Cir. 1983); *United States* v. *Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982); *United States* v. *Fowler*, 605 F.2d 181, 184 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *United States* v. *Castenada*, 555 F.2d 605, 610 (7th Cir.), cert. denied, 434 U.S. 847 (1977); *United States* v. *Black*, 480 F.2d 504, 507 (6th Cir. 1973); *United States* v. *Indiviglio*, 352 F.2d at 280. But see *United States* v. *Robinson*, *supra*.

witnesses) is fresh. See *Gass* v. *United States*, 416 F.2d 767, 775 (D.C. Cir. 1969); *Indiviglio*, 352 F.2d at 280. As this Court has observed, "[a]ny procedural rule which encourages the result that [trial court] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

As this Court's decision in *Socony-Vacuum* demonstrates, a strict construction of the plain error exception is particularly appropriate in considering allegedly improper summation arguments, both because argument errors are ordinarily easily correctible if brought to the attention of the trial judge at the time and because they are not well suited to review by appellate courts.

This Court has recognized, in circumstances far more serious than this, that curative instructions to the jury are sufficient to dispel the prejudice to the accused caused by improper prosecutorial comments in summation. *Donnelly* v. *DeChristoforo*, 416 U.S. at 644.[21] The courts of appeals have frequently

[21] In *Donnelly* the Court considered the prejudicial impact of an improper closing argument by a prosecutor, who asserted that the defendant hoped that the jury would find him guilty of something other than first degree murder (416 U.S. at 640). Because the prosecutor and the trial judge had cautioned the jury that the argument was not evidence, and because the trial court had given a cautionary instruction in response to the defendant's objection, this Court did not find the argument to justify reversal of the conviction on habeas review. The Court observed that "[a]lthough some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character" (*id.* at 644). If the argument in *Donnelly* was capable of being cured by a cautionary instruction, then the less prejudicial remarks in question here should certainly be considered susceptible to correction.

reached the same conclusion. *E.g.*, *United States* v. *Maccini*, 721 F.2d at 847; *United States* v. *Ward*, 481 F.2d 185, 187 (5th Cir. 1973); *United States* v. *Black*, 480 F.2d 504, 506-507 (6th Cir. 1973); *United States* v. *Webb*, 463 F.2d 1324, 1328 (5th Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Elmore*, 423 F.2d 775, 780-781 (4th Cir.), cert. denied, 400 U.S. 825 (1970); *Harris* v. *United States*, 402 F.2d 656 (D.C. 1968) (Burger, J.).

The difficulty of appellate review of an unchallenged closing argument stems from the fact that its impact on the jury—and hence its possible prejudice to a defendant—depends to a large extent on factors such as counsel's tone, gestures, emphasis, and facial expression, all matters not perceptible on a cold record to an appellate court. Trial court and counsel are in a far superior position to assess whether any prejudice has flowed from an argument. But where defense counsel makes no claim at trial of any error in the prosecutor's arguments, and the trial court sees none either, the risk is unduly great that an appellate finding of error will be based on a misreading of events that were innocuous at the time.

The analogy to improper jury instructions is instructive here. The Court has observed that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). Accordingly, if specific objection is not made at trial, a defendant may not generally raise the issue of inadequate jury instructions on appeal.

What this Court has concluded with respect to an unchallenged jury instruction applies a fortiori to an unchallenged closing argument. Not only is an improper argument as easily correctible at trial by means of a cautionary instruction (see *Donnelly* v. *DeChristoforo*, 416 U.S. at 644), but it is less susceptible to accurate review on an appellate record and far less likely to be prejudicial to a defendant. "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence," do not reach the proportions of a miscarriage of justice. See *id.* at 646; *United States* v. *Foster*, 711 F.2d 871, 883 (9th Cir. 1983).

These principles were plainly violated here. Respondent neither objected when the prosecutor made the now-challenged remarks nor requested a curative instruction afterward.[22] But even though respondent neglected to raise any objection to the prosecutor's summation at trial, the court of appeals reached the merits of his claim. The court accorded little respect to the contemporaneous objection rule. Instead, purporting to rely on the plain error exception of Fed. R. Crim. P. 52(b), the court applied its own per se rule concerning the content of a prosecutor's closing argument. In so doing, the court stretched the plain error exception beyond all reasonable bounds.

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[22] Even though tactical considerations might make defense counsel reluctant to interrupt his opponent's summation or rebuttal, he should surely have requested a curative instruction had he perceived any unfairness or prejudice to his client. See *United States* v. *Carter*, 720 F.2d 941, 950 n.7 (7th Cir. 1983). Defense counsel may also, where necessary, request a bench conference out of the hearing of the jury. See *United States* v. *LaCoste*, 721 F.2d 984, 988 (5th Cir. 1983), petition for cert. pending, No. 83-6391 (the argument that a defendant's failure to raise an objection at trial was "a strategic decision to avoid drawing attention to" the impropriety "should rarely be an exception to the [contemporaneous objection] rule because an attorney can always ask for a bench conference if he wishes to object without drawing attention to a matter.").

To begin with, the court of appeals made no inquiry regarding whether respondent's "substantial rights" were prejudiced, as the Rule requires. It instead concluded that the comment constituted "plain error" simply because the subject of improper prosecutorial comments had been addressed frequently and in strong language by that court on previous occasions (Pet. App. 10a):

> Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal.

But that position is contradictory to this Court's recognition that a plain error determination cannot be made solely on the basis of the nature of the error involved—that "each case necessarily turns on its own facts." *Socony-Vacuum*, 310 U.S. at 240. Moreover, it creates the possibility—a very real possibility in this case—that a conviction will be overturned on the basis of an abstract error that could not reasonably be thought to have affected the verdict.

Indeed, the court of appeals made no finding whatsoever that, in the context of this trial, respondent was prejudiced by the prosecutor's remarks.[22] In fact, such a finding would have been extremely difficult here, even apart from the wealth of evidence

[22] Even apart from the lack of a contemporaneous objection, an improper prosecutorial argument is not grounds for reversal unless there is substantial prejudice as well as impropriety. *E.g.*, *Maccini*, 721 F.2d at 846; *Angel* v. *Overberg*, 682 F.2d 605, 607-608 (6th Cir. 1982); *United States* v. *Kim*, 595 F.2d 755, 768 (D.C. Cir. 1979). Where there was no timely objection, the responsibility of appellate courts to focus only on substantial prejudice is all the greater.

showing respondent's guilt. After all, the trial court had cautioned the jury at the beginning of the trial that arguments of counsel were not evidence (Tr. 21), and, as we have shown, the jury almost certainly understood the comments as no more than a response to defense counsel's attacks on the prosecutor's personal sincerity and integrity. Most significantly, neither defense counsel nor the trial court saw anything obviously prejudicial in the prosecutor's statements at the time they were made. That casts considerable doubt on the notion that the statements could possibly have been so egregious that they led to a "miscarriage of justice" (*Frady*, 456 U.S. at 163). See *United States* v. *Trutenko*, 490 F.2d 678, 680 (7th Cir. 1973).

Nor did the court of appeals explain how the prosecutor's comments—which would be treated as legitimate "invited response" in most of the other circuits—could "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*Socony-Vacuum*, 310 U.S. at 239). If error at all, the remarks were exceedingly close to the line. Consequently, respondent's failure to object at trial to the prosecutor's argument should have precluded respondent's claim on appeal. *United States* v. *Perry*, 643 F.2d at 51; *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *Apgar* v. *United States*, 440 F.2d 733, 737 (8th Cir. 1971); *United States* v. *Kravitz*, 281 F.2d 581, 587 (3d Cir. 1960), cert. denied, 364 U.S. 941 (1961). Appellate consideration of a trial court error such as this, which is not obviously prejudicial and which the defense did not mention at trial, has been condemned by this Court as "extravagant protection." *Henderson* v. *Kibbe*, 431 U.S. at 154 n.12; *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

In addition to protecting a defendant from error that was most unlikely to have prejudiced his rights, the court of appeals' disregard for the contemporaneous objection rule also denigrated the role of the trial court by depriving it of any opportunity to correct the error. "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States*, 425 U.S. 80, 86 (1976); see also *Quercia* v. *United States*, 289 U.S. 466, 469 (1933) ("[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."). Where an error—if pointed out by defense counsel at the time—could easily be rectified by the trial court, it is especially inappropriate to permit the defendant to remain silent at trial only to raise the issue on appeal.

Had respondent's attorney lodged an objection at trial, the district judge would have been able to give a cautionary instruction to the jury, thereby curing any error that might otherwise have occurred. *Donnelly* v. *DeChristoforo*, 416 U.S. at 644. Because defense counsel did not object, however, the trial court was deprived of an opportunity to correct the "error" about which respondent now complains. Such a tactic is not to be encouraged. As this Court has noted: "Orderly procedure requires that the respective adversaries' views * * * be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). As one judge has observed:

> [C]ounsel have a duty to the court, an obligation at least to permit the judge to conduct a trial that finally determines the question at issue. A defendant may not remain silent in response to error and take his chances with the verdict before moving for a mistrial. Nor may he permit error to go unchallenged, then ask the appellate court to reverse the conviction.

United States v. *West*, 680 F.2d 652, 658 (9th Cir. 1982) (Wright, J., concurring). That obligation was ignored by respondent's counsel here. And since respondent cannot demonstrate that the belatedly noticed error resulted in a "miscarriage of justice" (*Frady*, 456 U.S. at 163), respondent should not benefit from his attorney's failure to accord the trial court a chance to remedy the error—if any—that arose from the prosecutor's remarks.

III. THE COURT BELOW ALSO ERRED IN FAILING TO ASSESS WHETHER THE REMARKS CONSTITUTED HARMLESS ERROR

Even had there been a timely but unavailing objection, the decision below nonetheless could not stand. The court of appeals reversed respondent's conviction without considering whether, in the context of the total record, any error in the challenged argument should be deemed to be harmless. In *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), this Court made clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (slip op. 9; see also *id.* at 10 n.7). *Hasting* clarified and reaffirmed a principle of long standing. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18, 21-22

(1967). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7), a category that undoubtedly includes improper summation arguments by the prosecutor, as *Hasting* itself bears out.[24] See also, *e.g.*, *Socony-Vacuum*, 310 U.S. at 242; *United States* v. *Foster*, 711 F.2d at 883; *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981). The decision below thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless error analysis. See also 28 U.S.C. 2111; Fed. R. Crim. P. 52(b).[25]

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[24] *Hasting* concerned a prosecutor's reference during summation to the defendant's failure to testify.

[25] *Hasting* also put to rest any claim that the court below might properly have acted in exercise of its supervisory powers within the Tenth Circuit. In *Hasting*, the Court held that a reviewing court may not ignore the harmless error rule by exercising its supervisory powers (slip op. 5-6). Indeed, in language equally apt here, the Court observed (*id.* at 7-8):

> The conclusion is inescapable that the Court of Appeals focused exclusively on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court. The court appears to have decided to deter future similar comments by the drastic step of reversal of these convictions. But the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.

That same kind of chastisement appears to be what the court below had in mind when it said (Pet. App. 11a) that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." The court of appeals apparently chose to punish the conduct of the prosecutor here

In our view, in cases where, as here, the defendant failed to preserve the claim of error for appeal by appropriate contemporaneous objection, the "harmless error" inquiry is properly subsumed within the "plain error" inquiry. For an error cannot affect substantial rights, let alone give rise to a serious risk of miscarriage of justice, unless there is a reasonable prospect, viewing the error in the setting of the entire trial, that it materially affected the verdict. Nevertheless, we take this opportunity to demonstrate that, even had the issue been preserved by timely objection, it could not have been materially prejudicial to respondent. Consequently, had the court of appeals followed the requirement of *Hasting* that it determine that an error is prejudicial before reversing a conviction, it could not have reached the result it did.

A number of factors support the conclusion that the prosecutor's comments did not substantially prejudice appellant's rights in the circumstances of this case. First, the trial court cautioned the jury at the outset of trial that the lawyer's arguments were not evidence. Second, the jury was undoubtedly aware that the prosecutor was an advocate and thus likely discounted much of his argument as the viewpoint of a party to the litigation. See *Donnelly* v. *DeChristoforo*, 416 U.S. at 640 n.7. Third, in the context of the defense provocation, the jury was unlikely to have understood the prosecutor's comments as anything other than a defense of his own integrity—not an intimation of evidence outside the record or an at-

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in order to vindicate its own unique closing argument rules; the court made no effort whatsoever to analyze the prejudicial effect vel non of the prosecutor's comments.

tempt to exploit the prestige of the government. See pages 25-26, *supra*.

Finally, and most importantly, the evidence against respondent was overwhelming. Not a single witness supported his defense that fuel oil mixed with condensate is equivalent to crude oil, and several witnesses expressly disavowed that position. It was beyond question that respondent failed to advise Apco of what he actually was supplying and that the oil he supplied did not meet the requirements of his contract. Moreover, the evidence conclusively showed that respondent acted affirmatively to conceal his scheme: he used an intermediary to recertify the fuel oil as crude oil, furnished a quantity of condensate each month to raise the gravity level of the oil he supplied to Apco, and concededly lied in response to inquiries from both Apco and government investigators. Under those circumstances, there was clear evidence of respondent's guilt. Cf. *Socony-Vacuum*, 310 U.S. at 239-240.

Not only was there strong evidence of respondent's guilt, but the error of the prosecutor's remarks was at most exceedingly marginal. As we have pointed out, the comments with which the court of appeals found fault were in fact prompted by defense counsel's own argument. Even if we are wrong in the view that the argument was fair response, it is scarcely possible that the prosecutor's remarks could have materially influenced the verdicts against respondent. The prosecutor's statement concerning his belief that a fraud had been committed were nothing more than a statement of the obvious. And his statement that Apco might well have to make restitution under the entitlements program was supported by the evidence (see Tr. 440). Finally, the prosecutor's ambiguous statements urging the jury not to acquit on a basis contrary to the trial court's instructions, and contradicting defense counsel's claims that respondent alone had acted with honor, appear an entirely proper response to what amounted to a defense plea for jury nullification. This statement could not have prejudiced any legitimate defense by respondent. In view of the strength of the government's case and the fact that the prosecutor's remarks were in direct response to defense counsel's arguments, it is virtually impossible that the prosecutor's rebuttal argument could have contributed in any significant respect to the jury's verdict. See *Hasting*, slip op. 11-13.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-469 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

BILLY G. YOUNG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Court of Appeals erred in reversing and remanding the case for new trial on the ground that the prosecutor's statements of his personal belief in respondent's guilt constituted prosecutorial misconduct.

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BRIEF FOR THE RESPONDENT

STATEMENT

I.
NO FRAUDULENT INTENT

Billy G. Young was charged with engaging in a "scheme to defraud" by selling fuel oil, certified as crude oil, to Apco Oil Corporation. Young's defense was that he was totally without fraudulent intent. The record shows that Young's actions were done in good faith and without the requisite *mens rea* to support a criminal conviction. The government witnesses who were personally acquainted with Billy Young testified to his honesty and integrity (Tr. 57, 115, 331, 359). The record is replete with testimony of this type showing the absence of fraudulent intent. Indeed, this testimony was given by Hugh Bradley, Apco's former vice president for supply and transportation (Tr. 359). Further, the gov-

ernment witnesses who knew Young testified that he did not, in their opinion, have any intent to defraud Apco (Tr. 58, 78).

II.
THE RESPONDENT

Billy G. Young, age 46 at time of trial, went to the eighth grade at a country school in eastern Oklahoma and then went to work to support his family, his father having been disabled in an accident (Tr. 469). Young has spent most of his life working in some phase of the oil industry, including working on drilling rigs, driving tank trucks, and doing the other manual labor associated with the oil field. Because of his ability to get along well with people and his qualities of industriousness and reliability, he became foreman over other men much his senior, and eventually entered the ranks of management. In 1974 he became an employee of Apco Oil Corporation in Oklahoma City. In January, 1975, he was offered a job as general manager of Compton Petroleum Company located in Abilene, Texas. (Compton was wholly owned by B & B Trading Company of Tulsa, Oklahoma, and had two presidents during the relevant period — Allen Daigle and Bob White). After Young had been with Compton about a year, he was made a vice-president. Prior to this indictment, Young had never been charged with criminal violations of any kind.

III.
BASIS FOR THE INDICTMENT

After Young had been with Compton a little over a year, he began receiving telephone calls from a man named Ken Ross. Young and Ross had become friends when they worked for the same oil company in the early '70s. By late 1976 Ross had fallen on hard times; he repeatedly called Young and Loretta Young, Billy's wife, at home and at the office wanting them to help him out and specifically seeking to sell some fuel oil (Tr. 329, 330, 476). Ross and the woman he subsequently married were then operating an outfit called "Prime Resources" in Tulsa. Ross told Young he could legally certify fuel oil as crude oil under the pertinent regulations. Young knew it was legally possible to do this (Tr. 477).

In December, 1976, Young hosted a group of Apco employees at Compton's hunting lodge near Abilene. Hugh Bradley, Apco's vice president, told Young that Apco was badly in need of more crude oil at its Cyril, Oklahoma refinery (Tr. 351). Having worked for Apco, Young knew the problems Apco had in obtaining product for processing at its inland refinery at Cyril. Apco was, in fact, essentially at the mercy of Koch Oil Company, a large crude oil trader that supplied over 25% of the Cyril refinery's daily runs (Tr. 360). Further, Young knew that it was not economical to operate a refinery at less than full capacity, because fixed costs were too high to be covered when the refinery operated on a reduced capacity (Tr. 386). The general quality of crude oil supplied to Apco's Cyril refinery was low gravity, some of it as low as 18° — indeed, it was so tar-like that it could not be transported in cold weather without first

being heated to a high temperature (Tr. 387, 388, 391). It is common practice in the industry to blend low gravity oil with high gravity oil to improve the overall quality of the mix. Compton's crude oil trader testified:

"Q. Is there anything unusual in your experiences in the oil industry with blending condensate with crude oil to increase the gravity and quality of the crude?

A. No sir, it's a common practice." (Testimony of Phillip Mark Alexander, Tr. 55).

Indeed, Koch Oil Company did it consistently. The former vice president for supply and transportation of Apco Oil Corporation testified:

"Q. Did Koch [Oil Company] frequently sell to Apco low gravity crude oil?

A. What they did they blended a low gravity with a high gravity condensate and what we bought was a 40 gravity or a good gravity crude oil.

Q. But Koch is — well, if I said Koch is notorious for blending low quality, low gravity crude with condensate would you agree with that statement?

A. I would hate to use the word notorious.

Q. Well, known for that?

A. Well known.

Q. You would agree with that?

A. I would agree with that.

Q. And it's one of the biggest crude oil traders in the industry, isn't it?

A. Yes." (Testimony of Hugh Bradley, Tr. 360, 361.)

In response to Hugh Bradley's inquiry, Young told Bradley he knew where he could get some low gravity crude. Bradley told Young that Apco needed it badly and to bring it on regardless of quality. Young informed Ross that he had found a buyer. Young arranged to purchase condensate from Mustang Fuel Company and Summit Oil Company to blend with the fuel oil to reconstitute the stream of oil in its original condition. Condensate is generally regarded as the highest quality crude oil available (Tr. 56). It has a gravity as high as 80°. It contains only the "high" ends of the typical crude oil barrel, that is, the components that produce naptha and gasoline (diesel and motor oil generally coming from the "lower" ends of the barrel). The fuel oil Young arranged to buy was No. 4 oil, which still has products in it that may be refined through a vacuum unit (which Apco had at its Cyril refinery) (Tr. 426). Number 4 oil is referred to as unfinished oil under the Department of Energy Regulations (Tr. 427).

Young knew that high gravity condensate would make the total mix a better stream of oil than Apco was generally getting (Tr. 56). The gravity of the blended stream was actually identical, or superior, to the lease crude being sold to Apco at its pipeline gathering stations. Compton's crude oil accountant testified:

"Q. And there's no question based upon Apco's tests that putting the condensate with the fuel oil made the gravity identical to the crude oil is there?

A. It's identical." (Testimony of J. M. Huff, Tr. 220.)

Young made it clear to Compton employees that improving the stream of oil to Apco was the reason for the blend. The operation's manager for Compton testified:

"Q. And Billy said this would give Apco the same equivalent as the quality it was getting elsewhere, didn't he?

A. Yes, sir.

Q. Billy had no intent to defraud Apco, did he, Mr. Fuller?

A. Not in my opinion, no sir." (Testimony of Kenneth C. Fuller, Tr. 78.)

Thus, Young thought he was doing a favor for all parties involved: Apco would get the supply of product it badly needed to improve the economic efficiency of its Cyril refinery operations, Ross would make the sales he desperately needed, and Compton would make at least a slight profit. This latter point merits emphasis: Compton actually lost money on its purchases of condensate to blend with the fuel oil (Tr. 480), but had a sufficient margin in its overall trucking to come out with a small profit. Young himself made no money on the transaction (Tr. 331, 338). The FBI conducted an intensive investigation to try to find that Young took kickbacks or otherwise got illegal gain. The FBI found that he did not (Tr. 300).

At trial, the prosecuting attorney cross-examined Young on the point that he got a bonus one year of 1% of the net profits of Compton. It was for job performance beginning in 1976, before there were any sales by Compton of fuel oil and condensate to Apco (Tr. 504). Yet, during the cross-examination and in closing argument, the prosecutor held out this bonus as an illegal inducement. The prosecutor's statements were improper and incorrect. Further, Compton sales to Apco were but a tiny fraction of its general operations.[1] Indeed, it's not certain that Compton had *any* "net profit" on its sales to Apco. Certainly the government offered no proof that it had any net profit. The only testimony on this point came from respondent.

"Q. What did you pay for that condensate compared to what you sold it to — sold it for to Apco?

A. Well, if I recollect, our sales to Apco was 85 cents over posting, that was considered our handling and gathering for trucking, et cetera. The portion we paid for Mustang, we gave 65 cents over posting. For the portion from Summitt we had to give 80 cents. But then we had the transportation of transporting that into Apco which overall we actually lost money on the condensate portion of it. But I felt like that we give Apco a good barrel and therefore since Apco was friends of mine, all the people in Apco was I consider some of my closest friends was helping them out because it was their job to get the supply in and by getting the fuel oil at a cheaper price, we could afford to pay a little more to get it to where we could come out." (Billy Young Testimony, Tr. 480, 481.)

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[1] Government counsel also questioned Young on cross-examination about "buying a refinery" after leaving Compton's employment in 1979. Government counsel used this point, utterly without evidentiary support, in closing argument to suggest to the jury that Young "bought the refinery" with money illegally obtained in the sales to Apco. Astoundingly, the trial court likewise referred to this as a basis for imposing sentence of two years imprisonment on Young at the sentencing hearing. In truth, Young obtained a partnership interest in a refining company totally on borrowed money after he left Compton's employment. The business was financially successful for a period of time thereafter, although it subsequently went bankrupt. The matter was utterly irrelevant to the charges against Young, and obviously prejudiced the jury.

As noted above, Young himself got no money or other thing of value as a result of Compton selling the fuel oil/condensate blend to Apco. There is no evidence to the contrary. But, as will be shown more fully later, the prosecutor repeatedly suggested to the jury that he had gotten money.

The relationship between Compton and Apco had existed for many years by written contract. It called for Compton to deliver sweet Texas crude to Apco and was signed by Billy Young. Likewise, Apco had long been a seller of crude oil to Compton. In short, they sold product back and forth and had done so for years before Billy Young went to Compton, and continued as trading partners after Billy Young left Compton. In fulfillment of the contract, Compton sold lease crude in large quantities to Apco throughout the period that the blend of fuel oil and condensate was being delivered to the Cyril refinery (Tr. 61, 62). The lease crude went into various Apco pipeline stations as well as into the Cyril refinery. Although the prosecutor consistently sought to leave the impression with the jury that Compton was selling only burner fuel to Apco, the fact is that during the January to September period covered by the indictment (as well as before and after) Compton sold lease crude oil to Apco pursuant to its contract, as well as the blend of fuel oil and condensate which was delivered to Cyril. The operations manager for Compton testified:

"Q. Was lease crude going to Apco at Cyril at the same time that the condensate and fuel oil were going there?

A. Oh yeah.

Q. Plain old virgin crude oil?

A. Yes, sir.

Q. And Mr. Fuller, was lease crude going to Apco at various pipe line terminals in Texas and Oklahoma?

A. Yes. sir.

Q. During that same period of time?

A. Yes, sir.

Q. Lots of it?

A. Yeah.

Q. No fuel oil in it?

A. No." (Testimony of Kenneth C. Fuller, Tr. 80.)

The gravity of the blend of fuel oil and condensate was generally higher than the gravity of the crude oil that Apco sold to Compton during this period (Tr. 220, 224).

Pride refinery is located a few miles from Compton's yard in Abilene. Producers Crude Oil Company (formerly known as Lancers) is also based in Abilene, and owned by a man named Truett Davis. Young and Davis were acquainted through prior business dealings. Producers Crude bought No. 4 fuel oil from Pride Refinery and hauled it to two 500-barrel holding tanks in Compton's yard. The Producers' truck that hauled the fuel oil was usually driven by one Mike Rawlings (he was related by marriage to Young), and made three or four trips a day. These trips were made in broad daylight and there was no attempt to keep them secret. Essentially everyone who was employed at Compton knew that the company was purchasing fuel oil, blending it with high gravity condensate, and selling the stream to Apco (Tr. 121). The fuel oil was transported

by truck from Abilene to Cyril where it was off-loaded into "LACT" units at the refinery. The trucks then drove to Chickasha, Oklahoma, picked up the condensate, and returned to Cyril to off-load it into the same sample tanks where the blending took place (Tr. 123). Apco took a sample from each combined load and tested it.[2]

IV.
NO COMPLAINTS BY APCO

The period of time covered by Compton's sales of the blend of the fuel oil and condensate to Apco was from January to September, 1977. As noted, Apco regularly tested the product being delivered by Compton. For over six months, Apco had no complaints. The product tested satisfactorily and the output of the refinery was not adversely affected.[3] It was not until July that Apco experienced excess production of residual fuel. That is the time that an entity called Pioneer Oil Company started deliv-

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2 The prosecutor also repeatedly tried to leave the impression with the jury that Compton's drivers were engaging in various acts to manipulate the samples or engaging in the act of concealment. The drivers all denied any such acts (Tr. 128, 129, 143). The prosecutor's examination on these points was done without any support in testimony ever elicited. It was improper. It was done for the sole purpose of unfairly prejudicing the jury.

3 "Q. In other words, no problem with the product from Compton was discovered, was found, was indicated, was reported to you of any kind through the months of January to July, 1977?

A. That's right.

Q. And Apco was testing the product and making their gauges on it, had a stock report of what was coming out of that refinery and everything was okay, wasn't it?

A. Yes." (Testimony of Hugh Bradley, Tr. 364.)

ering No. 6 fuel oil (sometimes called burner fuel) to the Cyril refinery. The fuel oil delivered by Pioneer had no condensate or other lease crude blended back into it (Tr. 358, 385). Apco carefully investigated the cause for the residual build-up and found the straight fuel oil from Pioneer. In the process of its investigation of all suppliers, Apco conducted a chemical analysis of Compton's deliveries and found it was approximately 50% fuel oil. Hugh Bradley and Don Heavin brought this to Young's attention. He told them he was not aware of fuel oil in the stream but if there was, he would shut it off. The blend of fuel oil and condensate from Compton ended.

V.
DEPARTMENT OF ENERGY REGULATIONS

In the government's allocation of energy resources program that followed the Arab oil embargo of 1973, the price of hydrocarbons was structured in "tiers" and the Department of Energy formulated regulations designed, among other things, to assure that all refineries paid essentially the same price for oil. It is fair and accurate to say that these provisions were exceedingly complex (Tr. 367). The regulations stated, inter alia, that certification of crude oil "tiers" was to be made on the basis of what kind of components constituted over 50% of the total "stream," it being a common practice in the industry to "blend" various types and qualities of oil together for various purposes, some technical and some practical.[4] It was Young's understanding

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4 The entitlements and certification program were no longer in existence at the time of trial; they were all rescinded by President Reagan soon after he took office (Tr. 367, 368).

that so long as over 50% of the total stream sold Apco was crude oil, it could be so certified without violation of any laws or regulations. (Tr. 483; see, defendant's Exhibit 18.) Others, far more sophisticated than Young, held the same view. Apco's former vice president of supply and transportation testified:

"Q. Are you acquainted with the Department of Energy regulations with reference to how you certify whatever makes up the principal component of the blend?

A. Somewhat.

Q. What is your understanding?

A. That if a crude oil contains more than 50% of a tier it can be certified as that tier crude.

* * *

Q. The regulations and the way the entitlements and certification program worked was very complicated, would you agree with that?

A. Extremely so.

Q. In fact, have you tried to read some of those regulations and couldn't make a lick of sense out of them?

A. Yeah, very much so.

Q. Do you have a college degree?

A. Yes." (Testimony of Hugh Bradley, Tr. 366, 367).

Over 50% of what Compton sold to Apco was lease crude oil.[5] Compton certified to Apco exactly what Prime

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[5] "Q. What was the major portion of — that Compton — well, by far that Compton was selling to Apco, was it crude oil or was it this fuel oil portion?

certified to Compton (Tr. 366). Apco made the certification reports to the Department of Energy for recording of entitlements. The certifications were made by Apco in 1977. The government had never attempted to cause Apco to make any adjustments in its reports or refund any money (Tr. 440). Nevertheless, the prosecutor told the jury the government *would* come back against Apco for reimbursement of any imbalance in the entitlements payments (Tr. 551). There is absolutely no support in the record for this statement. Apco's former vice president of governmental regulations and compliance testified:

"Q. Well, Mr. Wolf, has there been any adjustment whatever to Apco under this entitlements program on anything sold to it by Compton?

A. Not to my knowledge, no." (Testimony of Vincent L. Wolf, Tr. 440).

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[5] (Continued)

A. It was definitely crude oil.

Q. By overwhelming, isn't that so?

A. Yes, I would say by as much as 70 percent.

Q. And in your years of working for various oil companies, how common was the practice of blending to increase the gravity and quality of the oil?

A. Very common, all companies do it, even majors like the gentleman stated is here this morning when you get into a refinery, they like all various types of crude oil, gravities and condesate and everything mixed, * * *." (Testimony of Billy Young, Tr. 482, 483).

VI.
THE PROSECUTOR'S BELIEF IN RESPONDENT'S GUILT

The centerpost of Young's defense was that he simply never had any intent to defraud Apco or anyone else. Since the good faith of the defendant is an absolute defense in a criminal fraud case, the prosecutor bolstered the government's case by repeatedly stating to the jury, in his closing rebuttal argument, his own personal belief in Young's guilt:

> "I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, *I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did.* If we are allowed to give our personal impressions since it was asked of me.
>
> * * *
>
> "I don't know what you call that, *I call it fraud.*
>
> "You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. *I think it's a fraud.*
>
> * * *
>
> "He said — Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks, they won't come back but *my experience in these matters is when the government does something like this they're going to come back.* All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. *That's what I think.*
>
> * * *
>
> "Well, Mr. Bailey said that Mr. Young acted with honor and integrity in this case, he was the only one that did

> it. Well, he got all of his friends at Compton involved in this thing and he told his friends at Apco, Hugh Bradley, Don Heavin, said, no, I'm not selling you fuel oil. *I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it."* (Tr. 549-552) (Emphasis supplied)

The foregoing statements by the prosecutor of his personal belief in Young's intent to defraud and the duty of the jurors to find Young guilty caused the jury to return a verdict of guilty.

SUMMARY OF ARGUMENT

Respondent's defense was that he acted in complete good faith and that he had no intent to defraud. The proof at trial strongly supported his defense. The prosecutor repeatedly stated in closing rebuttal argument that he personally believed respondent intended to defraud. The prosecutor's statements had nothing to do with the evidence; the statements were designed to — and did — destroy the respondent's defense without regard to the proof. The prosecutor further admonished the jurors of their duty to find respondent guilty. The intimidated jurors did as they were told by the prosecutor. The prosecutor's statements of his personal belief and knowledge were not invited by anything said by defense counsel. The prosecutor's statements were not "harmless." The statemnets were plain error requiring reversal and remand.

ARGUMENT

THE PROSECUTING ATTORNEY'S STATEMENT OF HIS PERSONAL BELIEF IN RESPONDENT'S GUILT CONSTITUTES PROSECUTORIAL MISCONDUCT AND IS REVERSIBLE ERROR

The government apparently concedes that it was error for the prosecutor to state his personal belief that Young was guilty. The brief for the United States states on p. 15:

> "The prosecutor in rebuttal argument at trial stated his personal belief that respondent was guilty of fraud. Such a statement, examined in isolation, would be prosecutorial error."

But the government contends that the decision by the Court of Appeals remanding the case for new trial was nevertheless erroneous. The government's view of the evidence impels it to the conclusion, not surprisingly, that the case against respondent was "overwhelming" and therefore the prosecutor's statements of his personal belief in respondent's guilt were "harmless." The government appears to view the case as turning simply on the issue of whether respondent sold Apco a stream with fuel oil in it. Respondent readily admitted in his testimony at trial that portions of the stream sold to Apco contained fuel oil (Tr. 476). There was, in short, no dispute on that point. What was in sharp dispute was the issue of good faith. Put another way, the core issue at trial was whether Young intended to defraud Apco. In a criminal fraud case, the government is obligated to prove beyond a reasonable doubt that the defendant had a specific intent to defraud. As the Seventh Circuit Court of Appeals recently stated:

> "Mail fraud is a specific intent crime. The government is required to prove beyond a reasonable doubt that the defendant intended to defraud. *United States* v. *Weidman*, 572 F.2d 1199, 1207 (7th Cir. 1978), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *United States* v. *Marine*, 413 F.2d 214, 216 (7th Cir. 1969), cert. denied, 396 U.S. 1001, 90 S.Ct. 550, 24 L.Ed2d 493 (1970). Thus, good faith, or the absence of an intent to defraud, is a complete defense to a charge of mail fraud. *United States* v. *Hutul*, 416 F.2d 607, 624 (7th Cir. 1969), cert. denied sub. nom. *Sacks* v. *United States*, 396 U.S. 1007, 90 S.Ct. 562, 24 L.Ed.2d 499, reh. denied, 397 U.S. 1081, 90 S.Ct. 1519, 25 L.Ed.2d 820 (1970)." *United States* v. *Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

In *Steiger* v. *United States*, 373 F.2d 133, 135 (10th Cir. 1967), the court stated:

> "Good faith is a complete defense to a charge of using the mails to defraud in violation of § 1341 * * *."

In *United States* v. *Foshee*, 578 F.2d 629 (5th Cir. 1978), the court held:

> "It must be remembered that the burden is on the Government to prove beyond a reasonable doubt that the defendants had the specific intent to defraud. We have stated before that in mail fraud cases proof of intent is 'paramount . . . because the good faith of a defendant . . . is ordinarily a complete defense.' *Coleman* v. *United States*, 5 Cir., 1948, 167 F.2d 837, 839. Indeed, 'often the only available defense is that of good faith.'" 578 F.2d at 634.

Likewise, the charge of making a false statement in violation of 18 U.S.C. § 1001 requires proof beyond a reasonable doubt of specific intent. In *United States* v. *Lange*, 528 F.2d 1280 (5th Cir. 1976), the court held:

"Proof of five elements is essential to sustain a conviction under the false statement proscription of § 1001: (1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction. * * * it is our firm conviction that the necessary *mens rea* was not shown.

* * *

"A violation of § 1001 requires proof that the defendant had the specific intent to make a false or fraudulent statement, [citing cases]. The misrepresentation must have been made deliberately, [citing case], knowingly and willfully." 528 F.2d at 1287, 1288.

Viewed from the prospective of fraudulent intent, the government's case was exceedingly weak. There simply was no convincing evidence of any fraudulent intent. The prosecutor's repeated statements of his personal belief in Young's guilt was intended to destroy Young's only defense, which was his good faith belief that he was not doing wrong. Young did not deny the blending of a stream of condensate and fuel oil; rather, his defense was that it was done without any fraudulent intent whatsoever. There was ample evidence to support Young's defense. The jury did not return a verdict of guilty against Billy Young based on the evidence. The jury returned a verdict of guilty because of the prosecutor's repeated statements of his personal belief in Young's guilt and because of the prosecutor's insistence that they find Young guilty.

The government argues that the prosecutor's admittedly improper statements should not serve as a basis for a new trial because Young's counsel did not object. But the reality of a criminal jury trial is that an objection at that point is counter-productive. Unlike an objection to an improper

question of a witness, which prevents the eliciting of harmful and unfair testimony, an after-the-fact objection to what the prosecutor has already *said* in closing rebuttal argument merely focuses the jury's attention on the prosecutor's statement. Improper conduct by the prosecutor in closing rebuttal argument puts defense counsel in an untenable position before the jury. If the objection is overruled, it undercuts the entire protest defense counsel has previously made, and if sustained, the damage has been done and defense counsel is made to appear as protesting too much. The trial court cannot un-ring the bell that the prosecutor has banged. Emphasis by judge and counsel at that point only makes it worse. The jurors cannot perform the mental gymnastic of forgetting what they have heard so forcefully expressed. So, an objection, even assuming it is sustained, is counter-productive at trial, and undercuts the issue on appeal.

The only remedy for such clear abuse is insistence upon lawful and ethical prosecutorial behavior, enforced by the plain error rule. These points were emphasized many years ago by this Court in *Berger* v. *United States*, 295 U.S. 78 (1935). The matter can hardly be put more clearly than it was by this Court in the *Berger* case:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

* * *

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which

so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations *and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*

* * *

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." 295 U.S. at 88-89 (Emphasis supplied).

The prosecutor's expressions of his personal belief in Young's guilt were not only inherently reprehensible in and of themselves, but they were forcefully directed to the destruction of his only defense. They denied Billy Young a fair trial.

In its opinion reversing this case and remanding it for new trial, the Tenth Circuit Court of Appeals quoted the improper statements by the prosecutor and said:

"These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the Appellant's ~~attempt~~ intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the Appellant guilty. The issue has come before this Court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10th Cir. 1975); *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10th Cir. 1974)." (Pet. App. 10a.)

As noted in the above quote, the Tenth Circuit Court of Appeals has in several cases insisted that the prosecutor

observe his ethical obligations so that the jury may decide the case on the evidence and not on the prosecutor's directions to return a verdict of guilty.

In addition to his expressions of his personal belief in Young's intent to defraud, the prosecutor went outside the record and made statements not proven by the evidence. He said: "I think he [*i.e.*, Young] got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of." (Tr. 549).

There is absoluely no evidentiary support whatsoever for the prosecutor's statement that Young "got $.85 a barrel for every one of those 117,250.91 barrels," or that Young got one percent of "every bit of the money they made on that." As the Tenth Circuit Court of Appeals stated in *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975):

"The argument by Government counsel violated two fundamental rules. First the argument went outside the record and made statements as to facts not proven as to the malfunctioning of the camera and that the film showed the FBI agent after the incident. This was clearly improper. [citing cases] Second, the statement put the personal knowledge and belief of the prosecuting attorney on the scales, which is also clearly improper. [citing cases]" *Id.* at 503.

A case similar to the instant case is *United States* v. *Bess*, 593 F.2d 749 (6th Cir. 1979). The defense in *Bess*, like the defense here, was based upon the absence of criminal intent. The prosecutor expressed his personal belief in defendant's guilt. The Sixth Circuit reversed and remanded for a new trial, saying:

"Prejudicial statements are doubly inexcusable when they are made by a prosecuting attorney.

* * *

"An Assistant United States Attorney purports to represent the People of the United States, and thus carries a special aura of legitimacy about him.

* * *

"Implicit in an assertion of personal belief that a defendant is guilty, is an implied statement that the prosecutor, by virtue of his experience, knowledge and intellect, has concluded that the jury must convict. The devastating impact of such 'testimony' should be apparent. Equally apparent should be the serious infringement upon a defendant's due process rights. Such statements infringe upon the role of the jury as fact finder and determiner of guilt or innocence. They amount to inadmissible and highly prejudicial evidence." 593 F.2d at 753-755.

It is impossible to reconstruct here the prosecutor's loud, arm-waving, finger-stabbing closing rebuttal argument. The non-verbal communication was destructive of respondent's defense along with the verbal communication. In its brief in this Court, the government sacrifices its credibility when it characterizes the error of the prosecutor's remarks as "exceedingly marginal" (Government's brief, p. 38), or states that "it is scarcely possible that the prosecutor's remarks could have materially influenced the verdict against respondent" (Government's brief, p. 38), or that "it is virtually impossible that the prosecutor's rebuttal argument could have contributed in any significant respect to the jury's verdict." (Government's brief, p. 39).

In fairness, how can the government seriously advance these propositions? The government cannot know the effect

of the prosecutor's statements on the jury — neither, of course, can respondent. But one thing can be said with certainty: "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." *Berger* v. *United States*, 295 U. S. at 89.

The Court of Appeals held that the prosecutor's remarks "were sufficiently egregious as to constitute *plain error*." (Pet. App. 10a, emphasis supplied.) The government is hard put to breathe much life into its argument that the Court of Appeals failed to make a "harmless error" analysis. "Plain error," by definition, affects a substantial right and is not harmless. Rule 52(b), Federal Rules of Criminal Procedure. As stated by the Fifth Circuit Court of Appeals in *United States* v. *Miranda*, 593 F.2d 590 (5th Cir. 1979):

> "Having found plain error, it tautologically follows that the government cannot hide behind the 'harmless error' rule. This rule only operates to excuse error where evidence of the defendant's guilt is exceptionally strong and the error appears to have been harmless beyond a reasonable doubt." *Id.* at 596.

The case of *United States* v. *Hasting*, ____U.S. ____, 76 L.Ed.2d 96 (1983), is not applicable. The Court of Appeals did not invoke its supervisory powers in the instant case. It analyzed the prosecutor's statements and found plain error. Also, *Hasting* concerned a prosecutor's alleged reference to the defendants' failure to testify, not expressions by the prosecutor of his personal belief in defendant's guilt. In *Hasting* it was not even clear, as Justice Stevens pointed out in his separate opinion, that the prosecutor's comment

had reference to a failure to testify. Rather, the prosecutor's comment just as logically referred to specific defense testimony. (Stevens, J., concurring, 76 L.Ed.2d at 110.) In short, the matter was ambiguous.

Respondent has no need to quarrel with the *Hasting* decision or the rule of *Chapman* v. *California*, 386 U.S. 18 (1967), which *Hasting* applied. To be sure, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction." *Chapman* v. *California*, 386 U.S. at 22. This portion of the *Chapman* rule seems little more than a rule of necessity; indeed, appellate courts apply the harmless error rule constantly. But an abstract concept of harmless error has no application in the concrete setting of this case. Indeed, as this Court stated in *Chapman*, before such error can be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Further, as this Court stated in *Hasting*, if an error is harmless then "by definition, the conviction would have been obtained notwithstanding the asserted error." 76 L.Ed.2d at 104.

Under no circumstances can it be convincingly argued that Billy Young would have been convicted if the prosecutor had not given the jury his personal assurances that Young was guilty. Young was entitled to have the jury assess his defense of lack of intent to defraud strictly on the evidence, not on the prosecutor's "testimony" that *he* believed Young intended to defraud Apco. The impact of

the prosecutor's personal belief was compounded by his sarcastic and intimidating final "instructions" to the jury:

> "If you feel you should quit him for that it's your pleasure. I don't think you are doing your job as jurors in finding facts as opposed to the law that this judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it."

The Court of Appeals was not remiss in any duty to evaluate the error below.

The government's case against Young on the issue of fraudulent intent was weak. As often happens in such instances, the case was over-prosecuted. Defense counsel properly pointed out in summation that the case was over-prosecuted. The government's attempt in its brief to bootstrap an argument for "invited response" just doesn't hold water. There is an air of desperation in the government's combing of defense counsel's summation to wrench a word here or there out of context and hold it up as justification for the prosecutor's outrageous rebuttal argument. It won't work. Viewed in context, defense counsel's summation is not provocative and did no more than fairly argue the evidence, save for the six words "including those sitting at this table." It is these words, at bottom, upon which the government predicates its argument for "invited response." The words will not support the argument. They appear in the following context:

> "The indictment says that Billy Young is charged with intending to devise a scheme to defraud Apco and to obtain money and property by false and fraudulent pretenses. And I submit to you that there's not a per-

son in this courtroom including those sitting at this table who think that Billy Young intended to defraud Apco. Now, if you think that Billy Young intended to defraud Apco, if that was his scheme and intent, Billy Young is dead. But that's an element of this charge that the government is obligated to prove beyond a reasonable doubt. * * *" (Tr. 543, 544).

Perhaps it could be honorably argued by the government that defense counsel's remarks entitled the prosecutor to make his first salvo in rebuttal. The prosecutor said:

"I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me." (Tr. 549)

It has been previously noted that there is no evidentiary support for the prosecutor's statements. Nevertheless, if the prosecutor had stopped there, this issue might be a closer question. The prosecutor did not stop there — he repeated his personal belief in respondent's guilt on each subsequent page of his rebuttal argument. The prosecutor's repeated "testimony" of his personal belief in respondent's guilt violated respondent's due process rights. The combination of these inflammatory, intimidating, prejudicial remarks by government counsel constitute plain error requiring reversal.

The footnote in *Lawn* v. *United States*, 355 U.S. 339 (1958), upon which the government relies for its "invited response" argument is not on point. *Lawn* was not a case

where the prosecutor expressed his personal belief in defendant's guilt as in this case. Footnote 15 in *Lawn* states:

"The Government's attorney *did not say nor insinuate that the statement was based on personal knowledge* or on anything other than the testimony of those witnesses given before the jury, and *therefore* it was not improper." *Id.* at 359, n.15. (Emphasis supplied)

The clear inference of the above quoted language is that the prosecutor's blatant assertions of respondent's guilt in *this* case would have been condemned out of hand. A prosecutor's expressions of his personal belief in the defendant's guilt simply deprives the defendant of a fair trial. Indeed, what other holding is possible? Unlike most stratagems of opposing counsel, this is a tactic for which as a practical matter there is no off-setting response available. When the legal representative of the United States Department of Justice from Washington, D.C., stands in front of a jury in Oklahoma and forcefully admonishes them that if the jury should acquit defendant "I don't think you're doing your job as ~~Jurors~~ Jurors," and repeatedly tells them that "I think" defendant is guilty, the effect is devastating. No admonition can erase the prejudical effect of such statements.

There are various cases where a prosecutor has been permitted to respond to inflammatory and egregious conduct of defense counsel. Here, the six words ("including those sitting at this table")[6] spoken by defense counsel in his lengthy closing argument were mild, made in passing,

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[6] It might be well to note that the FBI agent who investigated the case was sitting at the table, too.

and unprovocative. It is submitted that they cannot, in a fair system of justice, provide a basis for the repeated, intemperate statements by the prosecutor.

It is simply a fact that prosecutors frequently make improper remarks during closing argument. The remarks come at a time when defense counsel is least able to counteract them effectively. The case of *United States* v. *Garza*, 608 F.2d 659 (5th Cir. 1979), is illustrative. The Fifth Circuit Court of Appeals stated the issue as follows:

> "This case presents nothing new -- no new issue of law or unique factual configuration. It presents rather a situation far too common and too often condemned by this court to be in any manner excusable. We must again deal with grossly improper prosecutorial comment during closing argument which substantially prejudiced defendant's right to a fair trial on the evidence presented in this case." 608 F.2d at 661.

In *Garza*, one of the justifications claimed by the government for the prosecutor's misconduct was that defense counsel had "invited" the improper response. Defense counsel stated in his closing argument: "Fine, I want to protect society from criminals, and you do to, but I don't want innocent people going to jail, and I'm sure you don't either." 608 F.2d at 662.

In rebuttal argument, the prosecutor responded to these comments by saying: "And, ladies and gentlemen, if I thought that I had ever framed an innocent man and sent him to the penitentiary, I would quit. Now, I resent the innuendoes that I would stand up here and try to send an innocent man to the penitentiary, and that's what it was. I resent that because it's simply not true because, believe

you me, there is presently enough work to do without fooling around with innocent people. Plenty enough. All over the place." *Id.* at 662.

In reversing, the Fifth Circuit Court of Appeals, quoting from one of its earlier decisions, stated:

> "Expressions of individual opinion of guilt are dubious at best. * * * This statement takes guilt as a predetermined fact. The remark is, at the least, an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them." *Id.* at 665.

In response to the government's contention that the prosecutor's remarks were "invited" by defense counsel, the Court of Appeals stated:

> "This statement was ostensibly in response to defense counsel's argument to the jury that, while society needed protection from criminals, such need did not justify convicting innocent people. But while defense counsel's argument can at most be construed as contending that the evidence did not warrant defendant's conviction, prosecution's argument went far beyond the evidence and sought to invoke the prosecutor's own credibility as a basis for a conviction." *Id.* at 665, n.4.

The *Garza* prosecutor made other statements of his personal belief in defendant's guilt. Defense counsel did not object. Finding that the prosecutor's remarks rose to the level of "plain error" the Court of Appeals stated:

> "While any single statement among those we have isolated might not be enough to require reversal of the conviction — and, indeed, some clearly would not — we think it beyond question that the prosecutor's improper comments, taken as a whole, affected substantial rights of the defendant. * * * In addition, as this Court ob-

served in overturning a conviction because of improper prosecutorial comment, despite a corrective instruction, once such statements are made, the damage is hard to undo: 'Otherwise stated, one "cannot unring a bell"; "after the thrust of the sabre it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it."' *Dunn* v. *United States*, 307 F.2d 883, 886 (5th Cir. 1962)." *Id.* at 665, 666.

The court observed that "objection to these extremely prejudicial comments would serve only to focus the jury's attention on them," and suggested that "in such circumstances the trial judge has an obligation to intervene to assure protection of defendant's right to a fair trial." *Id.* at 666 and n.7.

Also see, *Houston* v. *Estelle*, 569 F.2d 372 (5th Cir. 1978); *United States* v. *Meneses-Davila*, 580 F.2d 888 (5th Cir. 1978).

The *Garza* court accurately noted the perils of objecting to the prosecutor's improper remarks because such objections "serve only to focus the jury's attention" on the remarks. The same point was observed in *Brown* v. *Estelle*, 468 F.Supp. 42 (N.D. Tex. 1978). In *Brown*, defense counsel objected to some of the prosecutor's closing statements and not to others. The court noted that "On other occasions no objection was made in the fear, perhaps, that to do so would only emphasize the improper remarks or prejudice his client in the eyes of the jury by over objecting." *Id.* at 45.

The prosecutor's remarks in the case at bar went far beyond any rebuttal "invited" by defense counsel's closing. The remarks denied Billy Young a fair trial on the evidence.

CONCLUSION

The prosecutor told the jury in the first sentence of his opening statement that, "I'm a trial attorney in the fraud section of the Department of Justice headquartered in Washington." (Tr. 22). In his closing rebuttal argument, the prosecutor "testified" as his own expert. Clothed with his "special aura of legitimacy," the prosecutor told the jury that in his opinion respondent intended to defraud, and admonished the jurors of their duty to find respondent guilty. The prosecutor also made statements of his belief that respondent personally profited from the sales to Apco. This statement of the prosecutor's personal belief was without any support in the evidence; in fact, the testimony at trial, including the testimony of the FBI agent who investigated the case, was directly contrary to the prosecutor's statement.

These statements by the prosecutor of personal belief and knowledge carried "much weight against the accused." They denied Young the most fundamental of all rights in a civilized society — the right to a fair trial. They were plain error.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's brief is largely occupied with rearguing the defense case. Respondent states (Br. 1) that the record in the case "shows that Young's actions were done in good faith and without the requisite *mens rea* to support a criminal conviction." It is sufficient to observe that respondent made the same argument without success to the jury, and that on appeal, the evidence must be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Respondent's attempt to retry the facts of the case is, therefore, beside the point.

In any event, respondent's portrayal of the evidence in the case is somewhat misleading. Respondent acknowledges (Br. 1, 16), as he must, that he contracted on behalf of Compton Petroleum Corporation to supply virgin crude oil to Apco Oil Corporation, and that he deliberately supplied a mixture of fuel oil and high gravity condensate instead. Respondent asserts, however, that to do so was "a favor for

all parties involved" (*id.* at 6), that he "knew it was legally possible to do this" (*id.* at 3), and indeed that this operation produced "a better stream of oil than Apco was generally getting" (*id.* at 5).

Respondent neglects to point out that the Apco officials involved testified without exception that respondent's deliveries of fuel oil in lieu of crude oil did *not* meet their contract specifications. For example, Hugh Bradley, Apco's vice president of supply and transportation and the person with whom respondent contracted, testified as follows (Tr. 358-359):

> Q. Did Mr. Young ever tell you that he was selling you thousands of barrels of fuel oil mixed with crude and condensate every month?
>
> A. No.
>
> Q. To fulfill the contract he had with your company?
>
> A. No.
>
> Q. Would you consider that to be a fulfillment of a contract that you had with Compton and Apco if that were true?
>
> A. You mean selling us residual fuel?
>
> Q. Yes, sir.
>
> A. No, I would not.

See also Tr. 352-353, 393-395. Even respondent's crude oil trader, Phillip Mark Alexander, testified (Tr. 59) that he had never "heard of a company legally blending fuel oil with crude oil, condensate and saying that the whole thing is crude oil." Not a single witness supported respondent's

claim that fuel oil mixed with condensate could be certified and sold as crude oil.[1]

Perhaps most telling of all was respondent's own conduct at the time of the events in question. On three separate occasions, when questioned by two Apco officials (former friends) and by FBI agents, respondent falsely denied that he was supplying fuel oil in lieu of crude oil (Tr. 293-294, 357-358, 379, 496, 516).[2] If he had thought he was doing Apco a "favor" and was in compliance with the law, he would have had no reason to lie. Under the actual circumstances, however, it is understandable that respondent found the truth "kind of hard to explain" to his friends at Apco (Tr. 496).

On the strength of this overwhelming and virtually uncontradicted evidence of respondent's willful violation, it would have been surprising indeed had the jury failed to return a guilty verdict.

2. As to the legal issues presented by this case — the court of appeals' rejection of the "invited response" doctrine, respondent's failure to object at trial to the prosecutor's supposed errors in rebuttal argument, and the court of appeals' failure to consider the harmlessness of the error —respondent has but little response.

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[1]The only evidence in the case remotely supporting respondent's claim that he honestly believed that his actions were in compliance with the law and his contracts was respondent's own testimony at trial (Tr. 477) that, based on "my experience what I had heard and stuff through counsel and stuff," it was legitimate to sell *crude oil* as *fuel oil* — exactly the opposite of respondent's scheme and one that would not result in a false claim for entitlements.

[2]Indeed, in contradiction to his current position, respondent told the FBI agents at the time that crude oil was a "more valuable" product than fuel oil, and that if he discovered that he was selling fuel oil to Apco instead of crude oil he "would have immediately terminated the transaction or the deal" (Tr. 294).

a. The court of appeals held that the prosecution is not entitled to respond to improper defense remarks in summation, stating that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). Respondent does not appear to argue that this "rule" is correct. See Resp. Br. 27 ("There are various cases where a prosecutor has been permitted to respond to inflammatory and egregious conduct of defense counsel."). Nor does respondent make any attempt to dispute or distinguish the numerous cases cited in our opening brief (at 17 n.14, 20-21) in which the courts of appeals have recognized and applied the principle of "invited response." [3]

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[3]Respondent does assert (Br. 26-27) that this Court's decision in *Lawn* v. *United States*, 355 U.S. 339 (1958), is "not on point." As noted in our opening brief (at 16, 19-20), the situation in *Lawn*, where the prosecutor in rebuttal expressed his personal opinion on the credibility of certain key witnesses, was quite similar to that here. Respondent's purported distinction of *Lawn* is achieved by quoting only one of the three reasons this Court provided for affirming the conviction notwithstanding the prosecutor's remarks.

The first reason, quoted at Resp. Br. 27, was that the prosecutor in *Lawn* "did not say nor insinuate that the statement was based on personal knowledge" (355 U.S. at 359-360 n.15). The same, of course, could be said here. As pointed out in our opening brief (at 25), the prosecutor's remarks below contained no suggestion whatsoever that they were based on evidence outside the record, and indeed specifically directed the jurors' attention to the testimony.

The second reason for affirmance in *Lawn* — the reason most pertinent to this case — was that Lawn's counsel "had argued that the Government's case was a persecution of [the defendants], had been instituted in bad faith," and was not believed even by the prosecutors (355 U.S. at 359-360 n.15). Respondent's counsel's summation in the instant case was virtually the same, beginning with attacks on "unfair[]" government tactics and attempts to "poison your [the jury's] minds unfairly" (J.A. 4) and proceeding to the statement that not even the prosecutors believed that respondent was guilty (J.A. 5). This Court's holding in *Lawn* that the defense counsel's "comments clearly invited

Moreover, respondent essentially concedes (Br. 26) that the prosecutor was "entitled" to make the statement (J.A. 8-9; Tr. 549) of his personal belief that respondent "intended to defraud Apco." [4] This was, of course, the principal instance of vouching in the argument.

Respondent's position, therefore, reduces to the complaint that the prosecutor's argument "did not stop there" but contained additional statements of belief in respondent's guilt (Resp. Br. 26). However, having introduced — in a most emphatic fashion —the extraneous question of the prosecutor's beliefs, respondent could hardly complain when the prosecutor corrected the mistaken attack on his integrity more than once.

In any event, far from "repeat[ing] his personal belief in respondent's guilt on each subsequent page of his rebuttal argument," as respondent claims (Br. 26), the prosecutor did so only one additional time, two paragraphs later, after

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the reply which petitioner Lawn now attacks" (355 U.S. at 359-360 n.15) is directly and unmistakeably on point.

The third reason for affirmance in *Lawn* — the curative effect of trial court instructions — is not applicable here, because respondent's failure to object at trial or to request curative instructions deprived the trial court of any opportunity to consider issuing such instructions.

While purportedly distinguishing *Lawn*, respondent makes no attempt to distinguish *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), in which this Court also recognized the "invited response" principle.

[4]While conceding that this remark by the prosecutor was invited by the defense, respondent claims (Br. 21) that the statement (J.A. 8-9; Tr. 549) that "I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of" went outside the record and was not supported by the evidence. However, respondent's own testimony at trial confirmed that Compton received 85 cents a barrel for its deliveries to Apco (Tr. 501-502) and that respondent personally received a bonus of one percent of Compton's net profits (Tr. 503).

describing the testimony of two friends of respondent whom respondent had deceived. The prosecutor then stated: "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud" (J.A. 9).[5] Perhaps this reiteration of his belief in his case was not strictly necessary to dispel the misimpressions sought to be planted by respondent's counsel, but in the heat of trial, where *some* response was called for (as even respondent esssentially concedes), this additional statement hardly seems egregious or prejudicial. Indeed, it was little more than a statement of the obvious.

The other comments objected to by respondent were not statements of personal belief in respondent's guilt. The first (J.A. 10) was a correction of defense counsel's statement (J.A. 6) that Apco would not be required to refund the entitlements payments improperly received as a result of respondent's scheme. The prosecutor's statement that "in his experience" the government would "come back" for a refund (J.A. 10) was fully supported by the record evidence. Indeed, Apco's official in charge of regulatory compliance had so testified (Tr. 440). And the prosecutor's admonition that the jury would not be "doing your job as jurors in finding facts as opposed to the law" if the jury acquitted on the basis of respondent's concept of "honor and integrity" instead of following the court's instructions (J.A. 10-11) was an unexceptional (even if not well worded) statement against jury nullification.

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[5]It bears emphasis that these statements contained the prosecutor's personal opinion *on the evidence*; like the statements in *Lawn*, they contained no suggestion or insinuation that they were based on personal knowledge outside the evidence at trial. See 355 U.S. at 359-360 n.15.

In short, respondent does not attempt to defend the court of appeals' erroneous per se holding that the prosecutor is not entitled to reply to improper defense arguments in summation. Rather, he attempts lamely to exaggerate the extent of the prosecutor's response while minimizing the impropriety of his own provocative remarks. A fair reading of the defense argument and government reply clearly reveals that, while both counsel might have been more circumspect, the prosecutor's rebuttal was well within the bounds of fair response.

b. Respondent contends (Br. 18-19) that a defendant has no obligation to object to improper prosecutorial argument at trial, because "an objection at that point is counterproductive." He cites no precedent for this view, and it has been roundly rejected by this Court. This Court has held that curative instructions can be adequate to correct errors stemming from improper arguments by the prosecution (*Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974); see also *Lawn*, 355 U.S. at 359-360 n.15), and that defense counsel are under a duty to lodge timely objections to improper argument at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *Crumpton* v. *United States*, 138 U.S. 361 (1891)).[6]

The court of appeals disregarded respondent's failure to lodge a timely objection, concluding that the prosecutor's remark constituted "plain error" simply on the basis of the nature of the error in light of precedents in that Circuit. The

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[6]Even assuming arguendo that respondent is correct that to interrupt the prosecutor's argument by an objection is counterproductive because it calls attention to the error, there is no excuse for a defendant's failure to ask for a bench conference, request curative instructions, or move for a mistrial. These courses of action take place out of the hearing of the jury. See *United States* v. *Carter*, 720 F.2d 941, 950 n.7 (7th Cir. 1983); *United States* v. *LaCoste*, 721 F.2d 984, 988 (5th Cir. 1983), cert. denied, No. 83-6391 (June 4, 1984).

court accorded no consideration whatsoever to whether respondent's "substantial rights" had been prejudiced under the circumstances of this case. This was error, as we demonstrated in our opening brief (at 32-33).[7] Respondent does not attempt to defend this misconstruction of the "plain error" rule.

Instead, respondent defends the judgment below on the alternative ground that the prosecutor's remark in fact prejudiced his right to a fair trial. His argument on this point, however, is little more than the assertion (Resp. Br. 18) that "[t]he jury did not return a verdict of guilty against Billy Young based on the evidence. The jury returned a verdict of guilty because of the prosecutor's repeated statements of his personal belief in Young's guilt and because of the prosecutor's insistence that they find Young guilty." Without further analysis, however, this amounts to no more than a claim that prejudice may be *assumed*.[8]

Perhaps recognizing that the prosecutor's remarks on the face of the record (and especially in the context of the defense provocation) appear to carry little danger either of implying the existence of evidence outside the record or of overawing the jury by the prestige of the government (see U.S. Br. 24-26), respondent relies heavily on the "non-

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[7]Interestingly, since the petition for a writ of certiorari was filed in this case, the Tenth Circuit appears to have retreated from its position that improper prosecutorial remarks in summation constitute "plain error" merely because the court has so frequently condemned them. See *Mason* v. *United States*, 719 F.2d 1485, 1489-1490 (10th Cir. 1983).

[8]Respondent's picture of "intimidated jurors [who] did as they were told by the prosecutor" (Resp. Br. 15) is a bit overdrawn. After all, the jury *acquitted* respondent of interstate transportation of stolen property, the most serious crime with which he was charged. This suggests that the jury reached its own conclusions on the evidence, independently of the prosecutor.

verbal" aspects of the prosecution's summation. Respondent states (Br. 22) that "[i]t is impossible to reconstruct here the prosecutor's loud, arm-waving, finger-stabbing closing rebuttal argument. The non-verbal communication was destructive of respondent's defense along with the verbal communication." This argument merely substantiates our point (U.S. Br. 30) that trial court and counsel are in a far superior position to evaluate alleged errors in prosecutorial argument, which often depend on precisely the factors of tone, gestures, emphasis, and the like alluded to by respondent. The significance of such "non-verbal communication" is one important reason for insisting that alleged errors of this sort be raised at trial, not for the first time on appeal.

We do not know, and the record does not (and cannot) reveal, whether respondent's description of the closing argument is accurate. We do know, however, that neither trial court nor trial counsel saw anything amiss in the prosecutor's argument at the time it was made. If there had been any loud, finger-stabbing argument, then it presumably would have been perceived by those present in the courtroom. Neither the court of appeals nor this Court is in any position to contradict the eloquent silence of trial court and counsel.

c. Respondent's discussion of harmless error requires little reply. Contrary to respondent (Br. 23), the principle of *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 9, that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless," applies in all cases, not just those involving an exercise of the court's supervisory powers, and to all errors, not just comments on the accused's failure to testify.

The court of appeals simply failed to make any assessment of the impact of the prosecutor's statements, either in the course of making its "plain error" determination or

pursuant to a harmless error analysis. Accordingly, an error that was marginal at worst, and not noticed at trial, resulted in a needless reversal of the conviction. Reversal of a conviction is too high a price to pay for a prosecutor's error (if it was an error) that was not noticed at trial, when the error is not shown to have affected the defendant's substantial rights.[9]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1984

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[9] *United States* v. *DiPasquale*, No. 83-1364 (3d Cir. July 31, 1984), slip op. 27-32, is an example of the analyusis that should be applied to a case of this kind.

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